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In the
Supreme Court of the United States
OCTOBER TERM, 1978

JAYS FOODS, INC. and NIELSEN BROTHERS CARTAGE CO., INC.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX

	PAGE
Opinions & Proceedings Below	1
Jurisdiction	3
Questions Presented For Review	3
Statutes (& Congressional Reports Relating Thereto And Regulations Involved	5
Statement Of The Case:	
I. The Reasons Why Writ Of Certiorari Should Be Granted.	10
II. The Facts Relating To The Discharge of Edward Olson.	21
III. The Facts Relating To Jays' Termination Of Its Cartage Operations & The Contracting Out Thereof To Nielsen Brothers Cartage Co., Inc.	38
IV. The Propriety Of The Remedy.	70
Argument Amplifying Reasons For Allowance Of Writ	68
Conclusion	2

APPENDIX

(Separately Set Forth In Appendix Volume)

Appendix A	
(Opinion of U.S. Court Of Appeals herein reported in 573 F.2d 438)	1a
Appendix B	
(Petition For Rehearing filed below)	16a

PAGE

Appendix C

(Order of U.S. Court Of Appeals denying Petition For Rehearing) 31a

Appendix D

(Final Judgment Order of U.S. Court of Appeals herein) 32a

Appendix E

(Decision & Order Of The National Labor Relations Board, reported in 228 N.L.R.B. No. 54) 36a

Appendix F

(Decision & Recommended Order Of The Administrative Law Judge) 42a

Appendix G

(Statutes, And Congressional Reports Relating Thereto, & Regulations Involved) 91a

LIST OF AUTHORITIES CITED.

CASES.

Labor Board v. *Pittsburgh S. S. Co.*, 337 U.S. 656, 660, 69 S.Ct. 1283, 93 L.Ed. 1602 (1949) 69

N.L.R.B. v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 59 S. Ct. 501, 505, 83 L.Ed. 660 (1938) 17, 18, 71

N.L.R.B. v. *Walton Manufacturing Co.*, 369 U.S. 404, 418-419, 82 S.Ct. 853, 7 L.Ed. 2d 829 (1962) 20-21, 71

Universal Camera Corp. v. *N.L.R.B.*, 340 U.S. 474, 477-492, 71 S.Ct. 456, 95 L.Ed. 456 (1951) 11, 17, 18, 19

Acme Products, Inc. v. *N.L.R.B.*, 389 F.2d 104, 107-108 (C.A. 8, 1968) 58

Beaver Valley Canning Company v. *N.L.R.B.*, 332 F.2d 429, 433 (C.A. 8, 1964) 57

PAGE

H. Kress & Co. v. *N.L.R.B.*, 317 F.2d 225 (C.A. 9, 1963) 58

Jays Foods, Inc. v. *N.L.R.B.*, 292 F.2d 317 (C.A. 7, 1961) 68, 71

Lincoln Bearing Co. v. *N.L.R.B.*, 311 F.2d 48 (C.A. 6, 1962) 58

Mead And Mount Construction Co. v. *N.L.R.B.*, 411 F.2d 1154, 1157 (C.A. 8th, 1969) 13

Midwest Regional Jt. Bd., etc. v. *N.L.R.B.*, 564 F.2d 434, 438 (C.A. D.C., 1977) 16

N.L.R.B. v. *Adkins Transfer Co.*, 226 F.2d 324, 326 (C.A. 6, 1955) 68

N.L.R.B. v. *Arkansas Grain Corporation*, 392 F.2d 161, 165-166 (C.A. 8, 1968) 58

N.L.R.B. v. *Billen Shoe Co.*, 297 F.2d 801, 803 (C.A. 1, 1968) 38

N.L.R.B. v. *Century Broadcasting Corporation*, 419 F.2d 771, 780 (C.A. 8, 1970) 57

N.L.R.B. v. *Consolidated Diesel Electric Company, etc.*, 469 F.2d 1016, 1021, 1024-1025 (C.A. 4th, 1972) 15

N.L.R.B. v. *Drennon Food Products Co.*, 272 F.2d 23 (C.A. 5, 1959) 68

N.L.R.B. v. *Garner Tool and Die Manufacturing, Inc.*, 493 F.2d 263, 267-268 (C.A. 8, 1974) 38, 68

N.L.R.B. v. *Houston Chronicle Publishing Co.*, 211 F.2d 848 (C.A. 5, 1954) 66

N.L.R.B. v. *Injection Molding Co.*, 211 F.2d 59, 62 (C.A. 8th, 1954) 15

N.L.R.B. v. *Interboro Contractors, Inc.*, 388 F.2d 495, 499 (C.A. 2d, 1967) 14

PAGE

N.L.R.B. v. *Kingsford*, 313 F.2d 826 (C.A. 6, 1963) 68

N.L.R.B. v. *Larry Faul Oldsmobile Co.*, 316 F.2d 595 (C.A. 7, 1963) 58

N.L.R.B. v. *Lassing*, 284 F.2d 781 (C.A. 6, 1960) 68

N.L.R.B. v. *R. C. Mahon Co.*, 269 F.2d 44 (C.A. 6, 1959) 68

N.L.R.B. v. *J. Mitchko, Inc.*, 284 F.2d 573 (C.A. 3, 1960) 68

N.L.R.B. v. *Monroe Auto Equipment Co.*, 368 F.2d 975, 979-981 (C.A. 8, 1966) 58

N.L.R.B. v. *Paschall Truck Lines, Inc.*, 469 F.2d 74, 76 (C.A. 6th, 1972) 13

N.L.R.B. v. *Prince Macaroni Manufacturing Co.*, 329 F.2d 803, 806 (C.A. 1, 1964) 58

N.L.R.B. v. *W. L. Rives Co.*, 288 F.2d 511 (C.A. 5, 1961) 68

N.L.R.B. v. *Tom Wood Pontiac, Inc.*, 447 F. 2d 383, 386 (7th Cir. 1971) 38

N.L.R.B. v. *Twin Table & Furniture Co.*, 308 F.2d 686 (C.A. 8, 1962) 57

N.L.R.B. v. *United Parcel Service, Inc.*, 317 F.2d 912, 914 (C.A. 1, 1963) 38, 56

Torrington Company v. *N.L.R.B.*, 506 F.2d 1042, 1047 1049 (C.A. 4th, 1974) 14, 18, 71

Valley Forge Flag Company v. *N.L.R.B.*, 364 F.2d 310, 311 (C.A. 3rd, 1966) 69

STATUTES

Section 8 (a) (1) (3), National Labor Relations Act (29 U.S.C.A., Sec. 158 (a) (1) (3)) 3

Section 10 (b), National Labor Relations Act (29 U.S.C.A., Sec. 160 (b)) 5

PAGE

Section 10 (c), National Labor Relations Act (29 U.S.C.A., Sec. 160 (c)) 5, 12, 70

Section 10 (e), National Labor Relations Act (29 U.S.C.A., Sec. 160 (e)) 5

Section 10 (f), National Labor Relations Act (29 U.S.C.A., Sec. 160 (f)) 5

Title 5, Section 706, U.S.C.A. (dealing with judicial review of administrative proceedings). 6

REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD

Series 8 Regulations (Appendix to Title 29, U.S.C.A.):

Statements of Procedure, Series 8, Section 101.10(b) (1), found in 29 CFR, Sec. 101.10 (b) (1) 6

LEGISLATIVE HISTORY REFERENCES

The Committee of Conference, House Report No. 510, June 3, 1947 (reported in U.S. Code Congressional Service, 80th Congress, First Session, 1947, at pages 1159-1160, 1161, 1162-1163), reflecting the Congressional intent as it relates to the amendments to Sections 10(b), 10(c), 10(e) and 10(f) of the NLRA effectuated by the Labor Management Relations Act of 1947 (29 U.S.C.A. Sections 160 (b), (c), (e) and (f)) 6, 7-11, 12, 16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

JAYS FOODS, INC. and NIELSEN BROTHERS CARTAGE CO., INC.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable Chief Justice and Justices of the Supreme Court of the United States:

Jays Foods, Inc., petitioner herein, respectfully petitions for a Writ of Certiorari to review the decision and judgment order of the United States Court of Appeals for the Seventh Circuit in the within entitled cause in connection with the Petition For Review heretofore filed by the Petitioners, and the cross-application for enforcement heretofore filed by the National Labor Relations Board, with said Court of Appeals.

OPINIONS & PROCEEDINGS BELOW

This cause arises from the trial before the National Labor Relations Board of three (3) consolidated unfair labor practice complaints instituted against Jay Foods, Inc. (hereinafter sometimes referred to as Jays) and Nielsen Brothers Cartage Co., Inc. (respondents in the proceedings before the NLRB), charging Jays (in Case No. 13-CA-14889), a manufacturer of snack food products, particularly potato chips, with discontinuing its cartage operations, selling its trucking equipment used in connection therewith, contracting out its cartage operations to Nielsen, and discharging its tractor-trailer drivers, because of alleged union activities upon the part of said tractor-trailer drivers; and charging Jays, in a wholly unrelated case (Case No. 13-CA-14995) with wrongfully discharging one of its salesmen, an Edward Olson, because of his alleged union activities.

The decision (opinion) of the United States Court of Appeals for the Seventh Circuit, from which review is here sought, was issued on March 15, 1978, is reported at 573 F. 2d 438, and is set forth as Appendix "A", infra, p. 1a. Petitioner's Petition for Rehearing (set forth as Appendix "B", infra, p. 16a) was filed, in timely fashion, on March 29, 1978; and on April 6, 1978 the United States Court of Appeals for the Seventh Circuit entered an order (set forth as Appendix "C", infra, p. 31a) denying said Petition for Rehearing. On May 23, 1978, the United States Court of Appeals for the Seventh Circuit entered its final Judgment Order (set forth as Appendix "D", infra, p. 32a).

The decision and order of the National Labor Relations Board, from which the aforesaid review was taken to the United States Court of Appeals for the Seventh

Circuit, was issued on February 24, 1977, and is reported at 228 N.L.R.B. No. 54 (set forth as Appendix "E", infra p. 36a). Said decision and order of the National Labor Relations Board affirmed the rulings, findings and conclusions of the Administrative Law Judge (set forth as Appendix "F"), and adopted his recommended order as modified by the Board.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S.C.A. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

(1) What is the criteria for and what constitutes "substantial evidence" for purposes of Courts of Appeal determining whether or not the findings of fact, inferences and conclusions made by the National Labor Relations Board in Section 8 (a) (1) and (3) cases are supported by "substantial evidence on the record considered as a whole"?

(2) Section 10(c) of the National Labor Relations Act (29 U.S.C.A. Sec. 160(c), provides, among other things, as follows:

> "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

Where an employee is discharged "for cause", and there is evidence tending to show that his discharge was unrelated to his union activities, does the National Labor Relations Board have the authority, in the light of the

specific structures of Section 10(c) of the National Labor Relations Act, as amended, aforesaid, to require the reinstatement of such employee and the payment to him of back pay?

(3) Are the findings, inferences and conclusions of the Administrative Law Judge and the Board, in the instant cause, that Edward Olson, a employee, was discharged because of his union activities supported by "substantial evidence on the record considered as a whole"?

(4) Are the findings, inferences and conclusions of the Administrative Law Judge and the Board, in the instant cause, that Jays subcontracted its cartage operations out to Nielsen and discharged its tractor-trailer drivers because of alleged union activities upon the part of said tractor-trailer drivers, and in connection therewith committed certain unfair labor practices, supported by "substantial evidence on the record considered as a whole"?

(5) What was the criteria used by the Court of Appeals in the instant cause in determining whether or not the findings of fact, inferences and conclusions made by the Administrative Law Judge and the Board are supported by "substantial evidence on the record considered as a whole", and was that criteria a proper one?

(6) Did the Court of Appeals in the instant cause misapprehend, misapply and too narrowly construe the permissible scope of its review and reviewing function as laid down by the Supreme Court of the United States in the *Universal Camera Corp.* case?

(7) Are the remedies provided for in sub-paragraphs 2(a) and 2(b) of the Judgment Order, entered by the Court of Appeals on May 23, 1978, proper and appropriate under the facts and circumstances of this case?

STATUTES (& CONGRESSIONAL REPORTS RELATING THERETO) & REGULATIONS INVOLVED.

Sections 10(b), 10(c), 10(e) and 10(f) of the National Labor Relations Act, as amended by The Labor Management Relations Act of 1947 (29 U.S.C.A. Sec. 160(b), (c), (e) and (f)) are set forth verbatim in Appendix "G" (infra, p. .....).

Section 10(c) of the Act provides, in pertinent part, as follows:

> " . . . *If upon the preponderance of the testimony taken* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair Labor practices, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practices, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act..... *If upon the preponderance of the testimony* taken the Board shall not be of the opinion that the person named in the complaint has engaged or is engaging in any such unfair labor practice then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. *No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . .*" (Emphasis ours)

Sections 10(e) and (f) of the Act both provide, in essence, that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

Section 10(b) of the Act provides, in pertinent part, that proceedings before the Board "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28."

Title 5, Section 706 of U.S.C.A. (dealing with judicial review of administrative proceedings) is set forth verbatim in Appendix "G" (infra, p. .....), and in essence provides, in pertinent part, that the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be "(E) unsupported by substantial evidence . . ."

Section 101.10(b)(1) of the Board's regulations dealing with "Statements of Procedure, Series 8" in connection with hearings before the Administrative Law Judge (found in 29 CFR, Sec. 101.10(b) (1) provides as follows:

> "(1) No sanction is imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and *as supported by and in accordance with the preponderance of the reliable probative, and substantial evidence;*" (Emphasis ours)

The Committee of Conference, House Report No. 510, June 3, 1947 (reported in U.S. Code Congressional Service, 80th Congress, First Session, 1947, at pages 1159-1160, 1161, 1162-1163), reflecting the Congressional intent as it relates to the amendments to Sections 10(b), 10(c), 10(e) and 10(f) of the NLRA effectuated by the Labor Management Relations Act of 1947 (29 U.S.C.A.

Sections 160(b), (c) (e) and (f)), reads, in pertinent part, as follows:

> "(6) The House bill provided, in section 10(b); that proceedings before the Board should be conducted, so far as practicable, in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure. The Senate amendment retained the language of the present act, which provides that the rules of evidence prevailing in the courts shall not be controlling. The reason for this provision in the House bill was explained in full in the committee report on the bill. *If the Board is required, so far as practicable, to act only on legal evidence, the substitution, for example, of assumed 'expertness' for evidence will no longer be possible.* The conference agreement in section 10 (c) contains this provision of the House bill."
>
> "(7) In section 10(c) the House bill provided that the Board should base its decisions upon the "weight of the evidence". The Senate amendment retained the present language of the act, permitting the Board to rest its orders upon "all the testimony taken". *The conference agreement provides that the Board shall act only on the "preponderance' of the testimony—that is to say, on the weight of the credible evidence. Making the "preponderance" test a statutory requirement will, it is believed, have important effects. For example, evidence could not be considered as meeting the "preponderance" test merely by the drawing of "expert" inferences therefrom, where it would not meet that test otherwise. Again, the Board's decisions should show on their face that the statutory requirement has been met—they should indicate an actual weighing of the evidence, setting forth the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, for drawing this inference rather than that. Immeasurably in-*

creased respect for decisions of the Board should result from this provision."

• • •

"(10) *The House bill also included, in section 10(c) of the amended act, a provision forbidding the Board to order reinstatement or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged for cause.* The Senate amendment contained no corresponding provision. *The conference agreement omits the "weight of evidence" language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended* for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or *for* other *cause* (see Wyman-Gordon v. N. L. R. B., 153 Fed. (2) 480), *will not be entitled to reinstatement.* The effect of this provision is also discussed in connection with the discussion of section 7."

• • •

"(14) Under the language of section 10(e) of the present act, findings of the Board, upon court review of Board orders, are conclusive if supported by evidence. By reason of this language, the courts have, as one has put it, in effect 'abdicated' to the Board (N. L. R. B. v. Standard Oil Company, 138 F.2d 885 (1943)). See also: Wilson & Co. v. N. L. R. B. (126 F.2d 114 (1942)), N. L. R. B. v. Columbia Products Corp. (141 F.2d 687 (1944)), N. L. R. B. v. Union Pacific Stages, Inc. (99 F.2d 153). In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact (N. L. R. B. v. Hearst Publications, Inc., 322 U.S. 111; N. L. R. B. v. Packard Motor Car Co., decided March 10, 1947), or when they rested only on inferences that were not, in turn, supported by facts in the record (Republic Aviation v. N. L. R. B., 324 U.S. 793; Le Tourneau Company v. N. L. R. B., 324 U.S. 793)."

"As previously stated in the discussion of amendments to section 10(b) and section 10(c), *by reason of the new language concerning the rules of evidence and the preponderance of the evidence, presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions.* While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included, both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review."

"The House bill, in section 10(e), provided that the Board's findings of fact should be conclusive unless it appeared to the reviewing court (1) that the findings were against the manifest weight of the evidence, or (2) that they were not supported by substantial evidence."

"The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. *The provisions of section 10(b) of the conference agreement insure the Board's receiving only legal evidence, and section 10(c) insures its deciding in accordance with the preponderance of the evidence.* These two statutory requirements in and of themselves give rise to ques-

tions of law which the courts will hereafter be called upon to determine—whether the requirements have been met. *This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact—language which the conference agreement adopts—will very materially broaden the scope of the courts' reviewing power. This is not to say that the courts will be required to decide any case de novo, themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections, that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions.* It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in N. L. R. B. v. Nevada Consol. Copper Corp. (316 U.S. 105) and in the Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation, and Le Tourneau, etc., cases, supra, without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10(e) of the amended act."

• • •

(16) The conference agreement makes the same change in section 10(f) concerning the conclusiveness of the Board's findings as is made in section 10(e)." (Emphasis ours)

STATEMENT OF THE CASE

I. The Reasons Why Writ Of Certiorari Should Be Granted.

Twenty seven (27) years have elapsed since the Supreme Court in *Universal Camera Corp.* v. *N.L.R.B.*, 340

U.S. 474, 477-492, 71 S. Ct. 456, 95 L.Ed. 456 (1951), laid down the rule or standard that findings of fact by the Board (NLRB) with respect to questions of fact should be sustained by the Courts of Appeal only if "supported by substantial evidence on the record considered as a whole."

That standard is admittedly imprecise. As a result, the criteria or tests applied by the various Courts of Appeal in determining what constitutes "substantial evidence on the record considered as a whole" has varied and differed widely to a point (1) where a serious conflict presently exists between the various Circuits as to what are the proper criteria or tests to be applied in determining whether or not the findings of the Board are supported by "substantial evidence on the record considered as a whole", and (2) the Courts of Appeal have not infrequently, as in the instant cause, lost sight of the clear congressional mandate expressed in the Labor Management Act of 1947 (Act of June 23, 1947, c. 120, 80th Cong., 1st Sess., 61 Stat. 136, as amended) that the findings of the Board, to be sustained, must be predicated, *at least*, on the "*preponderance* of the testimony, that is to say, *on the weight of the credible evidence*." See Section 10 (c) of the National Labor Relations Act, as amended, (29 U.S.C.A. Sec. 160 (c); and Committee of Conference, House Report No. 510, June 3, 1947 (reported in U.S. Code Congressional Service, 80th Congress, First Session 1947, pp. 1159-1163).

It is respectfully submitted that the Court of Appeals in the instant cause has misapprehended the criteria or tests for determining what constitutes "substantial evidence on the record considered as a whole", thereby unduly fettering, restricting and limiting the permitted scope of its review and the exercise of its independent judicial judgment; and has misapplied the standard of review set forth in the *Universal Camera* case, *supra*.

Most decisions of the various Courts of Appeal make no attempt to define the criteria or tests by which the Court has determined whether or not the findings of the Board are supported by "substantial evidence on the record considered as a whole", and merely restate the standard imposed by this Court in the *Universal Camera* case, *supra.*

In those cases where the Courts of Appeals have sought to define what is meant by "substantial evidence on the record considered as a whole", or to delineate the criteria or tests for determining that standard, the Courts of Appeal have wound up with variegated, differing and conflicting criteria involving such a differing and wide range or spectrum of proof that the decision in a particular case, particularly a "close case" where there is conflicting evidence, must of necessity turn on and be influenced by the standard of proof that the Court of Appeals applies in reviewing the record.

This disparity in approach is reflected in the following cases.

Thus in *Mead And Mount Construction Co.* v. *N.L.R.B.*, 411 F.2d 1154, 1157 (C.A. 8th, 1969), the Eighth Circuit (before Blackmun, Gibson and Heaney, Circuit Judges) said:

> "At the risk of further complicating an already confused area, we restate what we consider to be the appropriate standards to be followed by Trial Examiners and the Board:
>
> (1) The General Counsel has the burden of proving by a fair preponderance of the evidence that the employee was discharged for his union activities or membership—that but for his union activities or membership, he would not have been discharged.
>
> (2) This burden can be satisfied by direct or circumstantial evidence,

> (3) The Board, in reaching its decision, is permitted to draw reasonable inferences, and to choose between fairly conflicting views of the evidence. It cannot rely on 'suspicion, surmise, implication, or plainly incredible evidence.'" (citing *Universal Camera Corp., supra*)

In *N.L.R.B.* v. *Paschall Truck Lines, Inc.*, 469 F.2d 74, 76 (C.A. 6th, 1972) the Sixth Circuit said:

> "The Supreme Court has defined substantial evidence as more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co. of New York* v. *NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938). [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 59 S.Ct. 501, 505, 83 L.Ed. 660 (1939). This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed. 2d 131 1966); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). In reviewing the credibility findings and the inferences drawn by the Board from the evidence, the test for a reviewing court is whether the conclusions are reasonable in light of the proven facts. Thus, this Court may not substitute its judgment on the question whether the inference drawn is the correct one or whether a different inference would be better supported, but is limited to the determination of reasonableness—not rightness. *NLRB* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106, 62 S.Ct. 960, 86 L.Ed. 1305 (1942); *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 48-50, 74 S.Ct. 323, 98 L.Ed. 455 (1954)."

In *Torrington Company* v. *N.L.R.B.*, 506 F.2d 1042, 1047, 1049 (C.A. 4th, 1974), the Fourth Circuit said:

> "Substantial evidence means 'evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inference.'" (citing cases)

In *N.L.R.B.* v. *Interboro Contractors, Inc.*, 388 F.2d 495, 499 (C.A. 2d, 1967), the Second Circuit said:

> "This court must look at the facts of each case and determine whether the supporting evidence, even if not preponderating in this court's view, nevertheless provides a sufficient basis for the Board's decision.

In *N.L.R.B.* v. *Injection Molding Co.*, 211 F.2d 59, 62 (C.A. 8th, 1954), the Eighth Circuit said:

> "After the Board performs that function (i.e. considers the evidence found in the record as a whole) and determines which of the opposing contentions is supported by the greater weight of the evidence, on submission of the issue of substantiality of the evidence to support the Board's finding, the court's province is confined to a determination of whether on the record as a whole, including of course the Respondent's evidence, the evidence upon which the Board based its finding was substantial. In doing that the court must make a comparison, not for the purpose of determining which contention is supported by the greater weight of the evidence, but in order to determine whether the evidence relied on by the Board is substantial in relation to the whole."

In *N.L.R.B.* v. *Consolidated Diesel Electric Company, etc.*, 469 F.2d 1016, 1021, 1024-1025 (C.A. 4th, 1972), the Fourth Circuit said:

> "In measuring a record for substantial evidence under the Act, it is error to assume that our inquiry should be no further than to ascertain whether there is evidence in the record, which, in and of itself, tends to support the Board's conclusion. Rather we are obliged to scrutinize the whole record, taking into account whatever fairly detracts from the evidence relied upon by the Board. *N.L.R.B.* v. *A. S. Abell Company* (4th Cir. 1964) 327 F.2d 1, 5. In short, the test is whether 'the inferences on which the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not * * * be deemed to be supported by substantial evidence'. *Black Hawk Corporation* v. *N.L.R.B.* (4th Cir. 1970) 431 F.2d 900, 902, cert. den. 401 U.S. 911, 91 S.Ct. 876, 27 L.Ed.2d 810."

In *Midwest Regional Jt. Bd., etc.* v. *N.L.R.B.*, 564 F.2d 434, 438 (C.A. D.C., 1977), the Court of Appeals for the District of Columbia said:

> "Our function is not to overturn the Board's choice between two equally plausible inferences from the facts if the choice is reasonable, even though we might reach a contrary result if deciding the case *de novo*."

Thus while all the courts hold that substantial evidence is "more than a mere scintilla", the Courts appear divided as to whether "preponderance of the evidence" or "weight of the evidence",—the test clearly mandated by Section 10 (c) of the National Labor Relations Act, as amended by the Labor Management Act of 1947,—is a necessary criteria or test for determining whether or not the Board's findings of fact are supported by "substantial evidence on the record considered as a whole."

The "substantiality of evidence" required to sustain the Board's findings of fact is obviously greater if the Board's findings must be supported by a "preponderance of the

evidence", or by the "weight of the evidence", than it would be if the degree of proof required of the Board to sustain its findings of fact on review "is more than a scintilla, but less than a preponderance".

There is a dearth of recognition by the Court of Appeal that Section 10 (c) of the National Labor Relations Act, as amended, requires the findings of fact of the Board to be supported by a "preponderance of the evidence", or the "weight of the evidence", and that the Courts of Appeal, in reviewing the findings of the Board to determine whether or not they are supported by "substantial evidence on the record considered as a whole", must in the first instance satisfy themselves that the Board's findings of fact are supported by *at least* a preponderance of the credible evidence, or the weight of the credible evidence.

Another test sometimes used by some of the Courts of Appeal in determining whether or not the Board's findings of fact are or are not supported by "substantial evidence on the record considered as a whole" is that the Board's findings of fact will be deemed to be supported by "substantial evidence on the record considered as a whole" if there is enough evidence to justify, if the trial were to a jury, a refusal by the Court to direct a verdict. This test apparently had its origins in *N.L.R.B.* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 59 S. Ct. 501, 505, 83 L.Ed. 660 (1939), a case antedating the amendments made to the National Labor Relations Act by the Labor Management Relations Act of 1947. Under this test if "substantial evidence" in support of the Board's findings is such relevant evidence as is enough to justify a denial of a directed verdict, if the case were before a jury, then the standard of evidence is apparently satisfied by any evidence supporting the necessary elements of the case, other than a scintilla, regardless of its weight or preponderance. This test would impose a burden on the respondent or employer in a case before the Board far greater than that envisioned or intended by the Congress or this Court in the *Universal Camera* case, *supra,* and would make the findings of fact of the Board immune from effective judicial review in any case where there was minimal evidence, but more than a scintilla, to support the Board's findings. In other words, on a Richter evidentiary scale of 1 to 10, with Number 1 on the scale being a "scintilla of evidence", the standard of proof sufficient to satisfy the substantiality test, would be anything more than the first line of the scale; a standard of proof far less than that envisioned or intended by the Congress, or this Court in the *Universal Camera* case, *supra.*

It is to be noted that the Court of Appeals in the instant cause apparently relies upon *N.L.R.B.* v. *Columbian Co., supra,* as the criteria or standard by which it measures whether or not the findings of the Board are supported by "substantial evidence on the record considered as a whole", saying with reference to the Olson discharge (see Appendix "A", infra, p. .....):

> "There is enough evidence from which a reasonable person might justifiably infer that Olson's discharge was due in part at least to his union activity. *N.L.R.B.* v. *Columbian* Co., 306 U.S. 292, 300, 59 S. Ct. 501, 83 L.Ed. 660 (1939)."

The Courts also appear to be in conflict as to whether or not the "substantial evidence" standard is met where the evidence "gives equal support to inconsistent inferences." *Torrington Company* v. *N.L.R.B., supra,* which holds that the substantial evidence test is not satisfied by evidence "which gives equal support to inconsistent inferences", would appear to provide a proper guideline; given the burden of proof imposed on the Board by Section 10 (c) of the National Labor Relations Act, as amended.

One other point worthy of note in connection with the variegated approach that the Courts of Appeal have taken in applying the substantial evidence standard of the *Universal Camera* case, *supra,* is the sometimes unwarranted deference shown by the Courts of Appeal, as in the instant cause, to findings and conclusions of the Board, even though the Court, from a review of the record as a whole is moved to comment that it might well come to conclusions or inferences different than or contrary to that adopted by the Administrative Law Judge and/or the Board if it were deciding the case *de novo.*

Thus in the instant cause, the Court of Appeals for the Seventh Circuit said at the very outset of its decision (Appendix "A", infra, p. 8a):

> "We find this a close and difficult case in which there is a great deal of conflicting evidence on many of the crucial questions. If we were deciding the case *de novo,* we might very well have made findings and conclusions contrary to some of the Board's determinations. However, we adhere to the limited scope of our review. . . ."

The reluctance of the Courts of Appeals under such circumstances to override the Board's findings, and to make the findings and conclusions that the Court admittedly would have made if the Court were deciding the case *de novo,* reflects the fettered and limited scope of review which the Courts of Appeals sometimes unwarrantly envision as their role in determining whether the findings of fact of the Board and the Administrative Law Judge are or are not supported by substantial evidence on the record considered as a whole.

As this Court said in *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474, 488, 496, 497 (1951):

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."
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> • • •
>
> "We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve."
>
> ". . . it (the Court of Appeals) should accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial."

As Justice Frankfurter said in his dissenting opinion in *N.L.R.B.* v. *Walton Manufacturing Co.,* 369 U.S. 404, 418-419, 82 S.Ct. 853, 7 L.Ed. 2d 829 (1962):

> "The opportunity of the trier of fact to observe the demeanor of witnesses should not be overlooked. But neither should it be overlooked that the Board itself has no opportunity to observe the demeanor of witnesses. Yet the Board is not required to accept a trial examiner's credibility findings, see *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474, 492-497, and, therefore, neither is the Court of Appeals. Even where the fact-finding function is not divided, due regard for the advantage of the trier of fact does not require appellate impotence. . . . Indeed, this Court has never before required complete deference to credibility findings. *Labor Board* v. *Pittsburgh S. S. Co.,* 337 U.S. 656, does not so hold; a great many findings not so unfounded as to indicate bias are nonetheless reversible error. In *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474, 490, this Court declared that Labor Board findings must be set aside when the record clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testi-

mony of witnesses or its informed judgment on matters within its special competence or both. A fair estimate of the worth of the testimony hardly suggests that the Board is free to make an unfair estimate, especially in the light of the decision in *Universal Camera* that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. . . . Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. Professor Davis states frankly that Administrative determinations of credibility are often set aside because the reviewing court firmly believes that the evidence supporting the determination is clearly less credible than the opposing evidence, Administrative Law Treatise, § 29.06, p. 145. Professor Jaffe concedes that his general rule of deference to credibility findings is not unyielding and agrees that this may be proper: even on a credibility issue we should probably not tolerate the intuitive 'hunch' where the record evidence overwhelmingly points to the contrary. 69 Harv.L.Rev., at 1032."

It is to be noted that the Board in the instant cause, in its decision and order affirming the rulings, findings and conclusions of the Administrative Law Judge (see Appendix "E", infra, p. 37a), has misstated and improperly shifted the burden of proof as it relates to the credibility findings of the Administrative Law Judge in holding that "it is the established policy of the Board not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect." What the Board should be saying under the preponderance of the evidence and substantial evidence tests is that the Administrative Law Judge's resolutions with respect to credibility must be supported by the clear preponderance of all the relevant evidence in order to be

sustained. Instead, the Board is shifting the burden of proof by saying that it is the respondent who has the burden of establishing by a "clear preponderance of all the relevant evidence" that the credibility resolutions of the Administrative Law Judge are incorrect.

II. The Facts Relating To The Discharge Of Edward Olson: (Case No. 13-CA-14955).

The statement of the facts of the case set forth by the Court of Appeals in its opinion admittedly "adheres to the Board's findings, which adopted those made by the Administrative Law Judge." Unfortunately, the findings of the Administrative Law Judge distort the record, and present a slanted version of the evidence adduced in this cause, and of the inferences to be drawn therefrom, that is not in accord with the record.

Although the Court of Appeals in the instant cause was moved to say (emphasis ours):

> "The discharge of Olson presents by far the closest and most difficult question in this case, *so close that it teeters on the balance*"; and
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> • • •
>
> "We recognize, as did the Board, that *Olson was negligent in the discharge of his duties*"; and
>
> • • •
>
> "*There may have been other, justifiable reasons for his discharge*", other than his union activity;

the fact is that the Court of Appeals in its opinion does not weigh, evaluate or discuss the overwhelming countervailing evidence in the record sustaining the petitioner's position, and, because of the limited scope of the reviewing function envisioned by it, gives too much deference to and uncritically accepts at face value wholly unwarranted findings, inferences and conclusions of the Administrative

Law Judge not supported by "substantial evidence on the record considered as a whole."

What follows is a summary of the relevant evidence adduced in the trial of this cause (with appropriate supporting references to the Report of Proceedings set forth in the printed Appendix, totaling some 1,326 pages, filed by the Petitioners with the Court of Appeals), and an evaluation of the respective evidence adduced by the parties in the light of the applicable criteria or tests for determining whether or not the findings of fact of the Board are or are not supported by "substantial evidence on the record considered as a whole" as mandated by this Court in the *Universal Camera* case, *supra.*

The reasons for Jays terminating Olson's employment, upon the recommendation of William Brand, the Branch Manager of the West Broadview) Branch, are clearly set forth in the Termination of Employment report dated December 1, 1975 (Respondent's Exhibit No. 7), prepared and submitted by Mr. Brand to Mr. Marttila (Executive Vice President, Marketing—Jays), and approved by Marttila on December 2, 1975, to-wit:

> "Very poor sales, lowest in West Branch. Caused by least amount of on-job sales time, 4 days only week of 11/29/75. He allowed two accounts, one Jewel and one National, to be out of stock on JAYS items for the week-end 11/29 and 11/30 due to no-sale by him 11/28/75. No arrangements made by E. Olson for delivery of product on Saturday 11/29/75. He knowingly permitted and approved out of stock for Customers and resultant loss of sales to Customer and Jays when he checked out for the week 11/28/75 disregarding opportunity available for completing his Route Sales on 11/29/75, increasing his sales commissions and satisfying Jays Customers."

The reasons given by Jays for discharging Mr. Olson are clearly supported and sustained by the evidence adduced in the hearing on this cause, and clearly indicate that Jays, in the exercise of its managerial prerogatives had bona fide and reasonable grounds for firing Olson; and that such discharge was not due in any way to any alleged union activities or sympathies upon the part of Olson.

The immediate precipitating cause for discharging Olson was his admitted failure to adequately service and make delivery of Jays products to two major chain store accounts (one a Jewel store at 550 N. Mannheim Road, and the other a National store at 942 York Road) for the post-Thanksgiving holiday weekend of 11/28/75 through 11/30/75; so that both of said stores were either out of or inadequately stocked with Jays products for that week-end. An additional major contributing cause and reason for Olson's discharge was his continued poor sales record (consistently among the lowest in the West Branch), caused by the minimal and least amount of on-job sales time which he gave to his job as a driver route salesman of Jays and his lackadaisical attitude and minimum-of-effort approach in promoting the sale of Jays products (App. 734-740, 619, 624-627).

The evidence is undisputed that Olson on Friday, November 28, 1975, the day after Thanksgiving, failed to deliver Jays products to and failed to service two of the chain store stops that were normally serviced on Fridays, namely the Jewel store at 550 N. Mannheim Road, Hillside, and the Natiional Tea store at 942 York Road in Elmhurst. The Jewel store, which was Olson's largest dollar sales volume store in terms of buying Jays products (App. 589-590), was normally serviced on Monday, Wednesday, and Friday (App. 594). The Na-

tional store was normally serviced on Tuesdays and Fridays (App. 594). Because the chain stores normally did a large volume of business on weekends, many being open not only on Saturdays but on Sundays as well, a greater dollar volume of Jays' products were sold to the chains on Friday than on any other single day in the week (App. 595-596). On Fridays, the chain stores would permit the driver salesman not only to put or replenish merchandise on the store display shelves, but in addition would allow the driver salesman to leave extra merchandise in stock in the stockroom so that the store would have merchandise for over the weekend business. Servicing these chain stores on a Friday after a holiday, and before the weekend, and if necessary on Saturday, was therefore of particular importance to insure that the store was adequately stocked with Jays products for the weekend (App. 594-596).

Prior to November, 1975, the Company (Jays) policy relative to the driver salesmen working on Saturdays, when a holiday occurred during the week, was that the driver salesmen had to work on Saturdays, and check the chain stores to see if they were adequately stocked irregardless of whether the particular salesman had completed his route by Friday (App. 545). Several weeks prior to Thanksgiving, 1975, the policy was changed so that if a route salesman could cover all the accounts on his route in 4 days during a holiday week, and service his accounts with adequate merchandise, the route or driver salesman did not have to come down on Saturday (App. 546). Olson clearly understood and knew this to be the policy of the Company when he failed to deliver Jays products to and failed to service the two chain stores in question on Friday, November 28, 1975, and on Saturday, November 29, 1975 (App. 683).

The record discloses that seven (7) out of the twenty four (24) drivers salesmen in the West Branch worked on that particular Saturday, November 29, 1975, selling and servicing their Jays accounts on their particular routes (App. 709-710). Other than Olson (who did not work that Saturday), and the seven (7) driver salesmen who did work that Saturday, all the other driver salesmen in the West Branch who did not work that Saturday had completed the servicing of their respective accounts (App. 710).

Olson's explanation for not servicing the Jewel store (*i.e.*, delivering and selling Jays products to said store) was that he arrived late at the store (at 2:10 P.M.), after the close of receiving hours (which was at 2:00 P.M.). Olson, who testified that he doesn't wear a watch (App. 647), stated that he went into the store through the receiving doors; that Gina, the receiving girl, told him that it was after 2:00 P.M., and that she was going home; and that he had better see Gene Miller (the grocery manager) before bringing anything in; that he then went upstairs to the store office and talked to Mr. Miller, and that the following occurred:

> "Mr. Hauk (the store resident manager) and Mr. Miller were engaged in a conversation, and I said, 'Excuse me, Gene, Gina said I should see you before I brought anything in', and he said, 'Well, it's 10 after 2. The receiving hours are until 2 o'clock.' I said, 'Yes, but I have been pretty busy, Gene.' He said, 'I'm sorry, but 2 o'clock, that is it.' So I said, 'In other words, you don't want anything?' He said, 'That's right.' I replies, 'Okay, Gene.' And I left." (App. 548).

Donald Skafgaard's (The Assistant Branch Manager of the Respondent's West Branch) testimony was that when he talked to the grocery manager (Gene) the next

morning (Saturday) and asked him how come he (Gene) was out of Jays products, that the grocery manager had told him that the driver, Ed Olson, had arrived at 2:20 P.M. on Friday (App. 840).

The record is clear that no attempt was made by Olson to look at or inspect the store's display shelves, or the stockroom in the rear, to see what amount, if any, of Jays products were on hand; which, if he had done so, would have disclosed to him that the store was virtually out of Jays products. Nor was there any attempt by Olson to dissuade the Grocery Manager to permit him to make delivery despite his (Olson's) late arrival (App. 644-648). Worst still, there was no attempt by Olson to come back on Saturday to check out whether the store was adequately stocked with Jays products, or to bring in merchandise, even though he (Olson) admittedly knew that deliveries could be made to the Jewel store on Saturday (App. 648), and even though Brand (The West Side Branch Manager of Respondent) had told him on Friday afternoon, when Olson checked into the branch, to *"take care of it"* when apprised by Olson that he (Olson) had arrived too late at the Jewel store that Friday to sell and deliver Jays products to that store that day (App. 734, 794). Olson's only explanation for not going back to and servicing the Jewel store on Saturday, when Brand questioned him on Monday morning (December 1, 1975) as to why he (Olson) had not serviced the Jewel store, was: "Well, Bill, I checked in—I didn't think of it and you didn't say a word to me either." (App. 551).

Donald Skafgaard (The Assistant Branch Manager of the West Branch of Jays) when he checked the Jewel store on Saturday morning (November 29, 1975) found that the store was basically out of JAYS products (*i.e.*,

of the 55¢ chips, the 79¢ boxes, the 79¢ dips, the big J boxes), with only a few allied items left on the shelf (App. 839-840). Skafgaard at that time asked the grocery manager of the Jewel store whether he (Skafgaard) could bring Jays products in, and was told that he could, except that Skafgaard was unable to do so since he had no product with him and the grocery manager would not wait for him to come back with a route van with said products. On Monday morning, when Skafgaard had Jays products brought into the Jewel store, and apologized to the resident manager for the store not being serviced on Saturday, the resident manager told Skafgaard that if Olson had approached him (the resident manager) on Saturday (November 29, 1975) that he (the resident manager) had a display spot in the front of the store for a forty (40) dozen display of Jays 79¢ boxes of potato chips; but since Mr. Olson did not approach him, he (the resident manager) had filled in that display spot with something else other than potato chips (App. 840, 846-847). Olson's failure to service said Jewel store on that Friday or Saturday therefore resulted not only in the loss of sales that normally could and would have been made to that store for the weekend business, but in addition cost the Respondent a loss of a special display in front of the store in connection with which the Respondent could have sold an additiional forty (40) dozen display of 79¢ boxes of potato chips.

Skafgaard also testified that on Saturday morning (November 29, 1975) he also checked out the National store at 942 York to determine why Olson had not made any sales to that store on Friday, and that he found that store to be out of Jays products (App. 840-841); that he talked to the grocery manager of that store who said that he (the grocery manager) couldn't believe that the

Jays driver salesman had not stopped in that day (Saturday), and that both the grocery manager and the receiving check-in girl told him that Olson had not been in on Saturday or on Friday—that nobody had seen him (App. 841).

Skafgaard then proceeded to stock the National store with Jays products with three (3) dozen boxes of chips, including one and one-half dozen on the shelves, and one and one-half dozen in the stock room (App. 841, 858). Although Olson claimed to have looked into the National store on Friday (November 28, 1975), he admitted that he was in a hurry, that he didn't talk to anyone about leaving additional Jays products, and in fact left no additional merchandise with that store even though there was room on the shelf for a dozen boxes (App. 649-651).

It is to be noted that the recommendation to discharge Olson originated with and came from William Brand, the West Side Branch Manager of the Respondent (App. 742 and Respondent's Exhibit No. 7). Nowhere in the record is there any indication or intimation that Olson was discharged because of his alleged union activities or sympathies.

Olson's lackadaisical attitude and minimum of effort approach to promoting the sale of Jays products was evidenced by (1) his consistent pattern of pulling in to the garage at the earliest possible pull-in time (App. 740); (2) the minimal amount of new accounts that he procured or solicited (App. 735); (3) his practice of stopping at his home or eating lunch at his home about three times a week during a normal five (5) day work week (App. 606), and his taking a short nap at home on occasion and looking in on his pigeons (App. 610-615) (he maintained two pigeon lofts at the back end of his

yard) (App. 612); (4) his continued low standing in terms of sales, generally ranking 24th, or last, among the 24 driver salesmen operating out of the West Branch (App. 734-735); and (5) his failure, in violation of Company policy, to come in on Saturday, November 29, 1975, to service and provide merchandise to the Jewel and National stores, as previously detailed.

The Administraitve Law Judge found that Olson was discharged by Jays because of his union activities and sympathies. It is respectfully submitted by the respondent, Jays, that there is no clear, convincing and credible evidence, direct or circumstantial, let alone "substantial evidence on the record considered as a whole" to support this finding and conclusion. A careful reading of the record makes clear that the Administrative Law Judge's findings are predicated on nothing more than a number of wholly unwarranted inferences, discussed below, that have no credible factual basis in the record.

First of all, there is no evidence in the record, direct or indirect, to indicate that the Respondent (Jays) had any knowledge whatsoever of Olson's activities either in contacting the union or in procuring the signatures of other driver salesmen on union authorization cards. (App. 987-988).

Secondly, the fact that Olson was the union observer at the West Branch in connection with the N.L.R.B. election held on October 2, 1975 would not warrant or justify the Court in drawing any inference that Olson was discharged because of his alleged union activities or sympathies; particularly where, as here, (a) the record indicates that none of the other union observers at the other three (3) branches were discharged; (b) that none of the union observers at a prior election involving the driver

salesmen in 1973 were discharged; (c) that Almasi, the driver salesman who replaced Olson on Route C13, was one of those who signed a union authorization card for Olson; (d) that none of the 18 driver salesmen from the West Side Branch, who signed union authorization cards for Olson, were discharged; and (e) that neither William Judges (the driver salesman of Route CO-2) or Ray Almasi (who substituted on Route CO-9 for Judges on November 28, 1975), both of whom had signed union authorization cards, were discharged (App. 582-584, 745-747, 849-850, 987-989).

That Olson was not "singled out" by Brand on Saturday morning, November 29, 1975, when he (Brand) and Skafgaard personally checked out seven (7) stores, for which no sales were shown on the Friday "route hard cards" for November 28, 1975, is clear from the record. Respondent's Exhibit No. 6, prepared by Brand on Saturday morning, November 29, 1975, in the usual and regular course of his duties from a review of the route hard cards in the West Branch, shows that three (3) other driver salesmen (viz. Alfred Edge, driver salesman of Route CO-2; Ray Almasi, substituting for William Judges, driver salesman of Route CO-9; William Henner, driver salesman of Route C-23), in addition to Olson, were checked out on that Saturday morning to determine why no sales had been made to certain stores on their routes on Friday, November 28, 1975. Of the five (5) stores listed for these other driver salesmen, all were found, on personal inspection by either Brand or Skafgaard, to have an adequate stock of Jays products on hand. Only the two stores that Olson was responsible for servicing, namely the Jewel store at 550 N. Mannheim Road and the National store at 942 S. York Road, were, as previously noted, found to be inadequately serviced and

stocked (App. 685-689, 697-720, 838-847, 866-869). See also General Counsel's Exhibit No. 19.

The Administrative Law Judge, in an apparent effort to rebut respondent Jays' contention that Olson was not "singled out" by Brand on Saturday morning, November 29, 1975, when he (Brand) and Skafgaard personally checked out seven (7) stores, for which no sales were shown on the Friday "route hard cards" for November 28, 1975, makes an issue of the fact that the driver (Henner) at one of the stores (a Kohl store) checked out by Skafgaard on Saturday morning was not criticized or disciplined for not coming in on Saturday morning to service that store (App. 64).

The fact is, as the record makes clear, that Skafgaard when he visited the Kohl store on Saturday morning found that the store shelves were adequately stocked with Jays products, and that Skafgaard, as long as he was already there and since this was a new store with no history as yet as to how much Jays products would be required on weekends, suggested to the store manager that the stock taken from the stockroom and put on the store shelves be replenished; which Skafgaard proceeded to do. On cross-examination, Mr. Brand, the branch manager of Jays, testified that he had gone over the matter with Skafgaard and the driver (Henner), and that he (Brand) was satisfied that the servicing of said store had not been improper or inadequate (App. 817-818). Mr. Skafgaard testified that when he examined the stock on hand at the Kohl store that Saturday morning that there were enough Jays products on hand (on the store shelves and in the stockroom) in his judgmgent to last over the weekend, but to make sure that the store "wouldn't run out of any of our good selling items", that he suggested adding some of these items to the stockroom (App. 841-842). The testimony of Brand and Skafgaard in this regard is totally unrebutted.

The Administrative Law Judge's finding that he found the aforesaid explanation of Brand and Skafgaard "less than persuasive", and that he "would have expected that the other salesman (Henner) would have at least been criticized" (App. 64, note 32) since Skafgaard delivered additional stock to the store on Saturday, is a glaring example of a wholly unwarranted and obviously prejudicial inference read into the record by the Administrative Law Judge, having no factual foundation whatsoever in the record.

It is to be noted that the fact that Olson was late in getting to the Jewel store in question on Friday, and was therefore unable to service said store on that date, is not the gravamen of Olson's conduct that precipitated his discharge. The gravamen was the fact that Olson, in clear violation of Company policy, did not come in on Saturday, the next day, to service the Jewel and National stores that he had failed to take care of on Friday. This in face of the fact that some seven (7) other driver-salesmen of the West Branch had come in that Saturday to complete servicing their routes because of the intervening Thanksgiving Holiday the preceding Thursday. Added to Olson's demonstrated lackadaisical attitude and minimum of effort approach to promoting the sale of Jays products, the Branch Manager (Brand) who had repeatedly remonstrated with Olson concerning Olson's poor sales record, recommended Olson's discharge. All this, it should be noted, took place approximately two (2) months *after* the Union election of October 2, 1975. In the two month interval between that election and the incident which precipitated Olson's discharge, there is no credible evidence to indicate that the Petitioner was in anyway trying to "set-up" Olson as an excuse or pretext to fire him.

The finding of the Administrative Law Judge that Jays' executive vice president, Silas Martilla, ordered the newly appointed West Branch Assistant Manager, Donald Skafgaard, to follow Olson on his route because Olson was pro-union, a wholly unwarranted finding uncritically accepted by the Court of Appeals in its opinion, is predicated on wholly uncorroborated hearsay testimony of the rankest sort in no way supported by "substantial evidence." This finding is predicated on Lull's wholly uncorroborated testimony (denied by Skafgaard) in relation to an alleged conversation that he allegedly had with Skafgaard at a New Year's Eve party held at Dennis Altgeber's home on December 31, 1975, relating to Olson. Lull on cross-examination (App. 367) testified that Skafgaard told him that "He (Skafgaard) had followed him (Olson) home *and caught him at home at 11:00 A.M. in the morning.*" (Emphasis ours)

It is to be noted that *there is no claim or testimony whatsoever by Olson* that he had ever been followed or kept under surveillance by Skafgaard or anybody else from management, or that Skafgaard had caught him (Olson) at home at 11:00 A.M. in the morning. Skafgaard, who had come over to the West Side Branch from another branch only a few weeks before, specifically denied engaging in any surveillance of Olson (App. 847-848). Certainly common sense dictates that if Skafgaard had caught Olson at home at 11:00 A.M. in the morning, that Skafgaard would have testified to that effect in support of Petitioner's position that Olson was discharged for good cause. There is no such testimony by Skafgaard. The credibility of Lull's uncorroborated hearsay testimony in this regard is also open to question in view of the fact

that *it was Lull, and not Skafgaard,* who in connection with this alleged conversation, allegedly volunteered the information that "Olson was pro-union." (App. 364)

It should be evident to this Court that this rankest sort of uncorroborated hearsay testimony by Lull, clearly controverted on the record, cannot reasonably be deemed to be of sufficient probative and corroborative value to warrant drawing any inference that Olson was discharged for his alleged union sympathies and activities.

Another glaring example of a wholly unwarranted and prejudicial inference read into the record by the Administrative Law Judge is his reliance on the wholly uncorroborated and controverted testimony of Olson (denied by Mr. Japp) that after the election, held on October 2, 1975, Leonard Japp, Sr., the president of the company, allegedly approached Olson and extended his hand in a handshake, and allegedly said in what the Administrative Law Judge characterized as "an unfriendly insincere tone": "Thanks a lot, Ed." For the Administrative Law Judge to attempt to draw any unlawful inference (of an intent to discharge Olson because of his alleged union sympathies or activities) from this type of incredulous testimony is patently ridiculous. It is to be noted that this alleged incident allegedly took place on October 2, 1975, while Olson was not discharged until two months later on December 1, 1975 (App. 1158, 543).

Nor is the pamphlet entitled "Let's Talk Dollars And Sense" (General Counsel's Exhibit No. 16), put out by the Respondent in connection with the union election held on October 2, 1975 (which election the union lost, and to the conduct of which election the Union filed no objection), a basis for drawing any inference that Olson was discharged because of his alleged union activities or sym-

pathies. The fact that the Respondent honestly felt that the driver salesmen would be better off without a union, a point of view sanctioned by the First Amendment (and agreed to by a majority of the driver salesmen at the election) is no necessary indication of anti-union animus upon the part of the Respondent; and even if it were to be construed as reflecting the employer's antipathy or hostility to a union, the same does not supply an unlawful motive as to Olson's specific discharge for purposes of showing an unfair labor practice.

The Administrative Law Judge has also chosen to draw an inference, that the Petitioner discharged Olson because of his alleged union sympathies or activities, from the facts that Olson had worked for Jays for over 20 years, and the fact that Petitioner elected to discharge Olson rather than suspend him or warn him against any future infractions against company rules.

The record clearly indicates not only that the Respondent was and had been dissatisfied with Olson's poor sales record, caused by the minimal and least amount of on-job sale time which he gave to his job as a driver salesman, and his lackadaisical attitude and minimum-of-effort approach in promoting the sale of Jays products, but in addition indicates that Bill Brand was constantly needling and reminding Olson that he (Olson), an experienced long time employee, ranked among the lowest in terms of dollars volume sales of all the driver salesmen in the West Branch, and that he (Olson) could do better, and that Olson's only rejoinder was that he (Olson) was doing the best he could. (App. 738). Respondent's dissatisfaction with Olson's work performance was therefore known to Olson. Olson's failure to properly service the two chain store accounts, particularly his unexplained failure to come in on Saturday to complete servicing said accounts

(in violation of the Company's policy and rule that the accounts must have been properly serviced before a driver salesman could take off on Saturday, particularly after a Holiday) was an unforgivable sin in the eyes of the Respondent, with its stress on servicing its large chain store accounts, and was the straw that broke the camel's back so to speak, given the Respondent's dissatisfaction with Olson's overall work performance.

Whether the inference drawn by the Administrative Law Judge is a reasonable one, and whether a reasonable countervailing inference deserving of equal weight can be drawn that Olson's discharge was not unlawfully motivated, but was instead due to Olson's unexplained failure to come in on Saturday to service the two chain stores in question (knowing as he did that he had not serviced the Jewel store on the preceding day, Friday, because he had arrived at the store late), and Petitioner's dissatisfaction with Olson's poor sales record and his lackadaisical attitude and minimum-of-effort approach to promoting the sale of Jays products, is one that must be gauged on the "substantiality" of the record as a whole in supporting one or the other inference. Misguided sympathy for Olson, in spite of his admitted inadequacies of his job performance, because he had lost his job is not the test. He was not left bereft, since his vested rights of some 15 or 16 years of participation in the Petitioner's Profit Sharing and Pension Plans still accrued to him upon severance of his employment. Absent meaningful other or corroborative "substantial evidence" on the record as a whole, of which there is none in the instant cause, that Olson was discharged by the Petitioner because of his union activities or sympathies, no inference of any unlawful motive upon the part of the Jays can properly be drawn by the Labor Board by reason of Petitioner's decision to terminate

Olson's employment, rather than suspend or otherwise discipline him. See *N.L.R.B.* v. *Garner Tool and Die Manufacturing, Inc.*, 493 F.2d 263, 267-268 (C.A. 8, 1974); *N.L.R.B.* v. *United Parcel Service, Inc.*, 317 F.2d 912, 914 (C.A. 1st, 1963); and *N.L.R.B.* v. *Billen Shoe Co.*, 297 F.2d 801, 803 (C.A. 1st, 1968)

The case of *N.L.R.B.* v. *Tom Wood Pontiac, Inc.*, 447 F.2d 383, 386 (C.A. 7, 1971), cited by the Court of Appeals in its opinion, can clearly be distinguished on the facts from the Olson case, and furnishes no real basis for comparison to the Olson case.

In the *Tom Wood Pontiac* case, supra, the aggrieved employee, one day after the Union's election victory, was formally reprimanded for low productivity, tardiness, and participation in "group bull sessions during working hours." Two weeks later he was reprimanded by the shop foreman for being nine minutes late. Two weeks after that he was discharged, allegedly on the basis of his work as a bumper man being eliminated, even though the company thereafter continued doing bumper work. The evidence also indicated that the Company knew that the employee was a "main man" in the Union, and that the Company had interrogated him prior to the election. Clearly under the circumstances of that case, the Board could and did find that there was substantial evidence on the record as a whole to conclude that the reprimand and his discharge on the basis of his job being eliminated were pretexts to hide the motive for firing the employee because of his union activities.

In the Olson case, there is no evidence of any interrogation of Olson by the Petitioner. His discharge took place two months after the Union election, and for reasons that were supported by substantial evidence, viz. his failure to properly service two of his chain store accounts, added to

his past history of poor sales performance; rather than a contrived situation or pretext set up by the Company as in the *Tom Wood Pontiac case,* supra. There is no real comparison between the two cases.

The uncritical acceptance by the Court of Appeals of the unwarranted findings, inferences and conclusions of the Administrative Law Judge does a grave injustice to the Petitioner, and negates the function of judicial review by Courts of Appeal contemplated and mandated by the *Universal Camera Corp. case,* supra.

Given the state of the record here, the expressed misgivings of the Court of Appeals that the *Olson* case is so close "that it teeters on the balance", and the findings of the Court of Appeals that Olson was negligent in the discharge of his duties, and that justifiable reasons existed for his discharge, it is apparent that the Court of Appeals in the instant case has misapprehended, misapplied and too modestly and narrowly construed the permissible scope of its review and reviewing function as laid down by this Honorable Court in the *Universal Camera* case, *supra;* and that because of the limited scope of the reviewing function envisioned by it, the Court of Appeals has given too much deference to and has uncritically accepted at face value findings, inferences and conclusions of the Administrative Law Judge clearly not supported by "substantial evidence on the record considered as a whole."

III. The Facts Relating To Jays' Termination Of Its Cartage Operations, And The Contracting Out Theretof To Nielsen Brothers Cartage Co., Inc. (Case No. 13-CA-14889 Of The Consolidated Proceedings Below)

On November 14, 1975, the respondent, Jays, a manufacturer of snack food products, particularly potato chips

terminated its cartage operations, discharged all (26) of its tractor-trailer drivers, and effective November 17, 1975 sold its tractor-trailer equipment and supplies to the respondent, Nielsen Brothers Cartage Co., Inc., a trucking company engaged in the cartage business (hereinafter sometimes referred to as "Nielsen", and "contracted out" all its cartage requirements to Nielsen pursuant to a contractual agreement entered into between Jays and Nielsen. Fifteen (15) of these tractor-trailer drivers so discharged were hired by Nielsen on November 15, 1975, and an additional eight (8) of these tractor-trailer drivers discharged by Jays were hired by Nielsen on January 12, 1976. Nielsen is, and has for many years, been unionized, and its tractor-trailer drivers are represented by the Chicago Truck Drivers, Helpers, and Warehouse Workers Union (Independent) as the collective bargaining agent of its tractor-trailer drivers.

Jays contends that it discontinued its cartage operations and contracted same out to Nielsen for valid business and economic reasons wholly unrelated to any alleged union activities upon the part of its tractor-trailer drivers, and denies that it committed any unfair labor practices in connection therewith.

The Administrative Law Judge found that Jays subcontracted its cartage operations out to Nielsen and discharged its tractor-trailer drivers because of alleged union activities upon the part of said tractor-trailer drivers, and in connection therewith committed certain unfair labor practices.

As a remedy, the Administrative Law Judge recommended an Order (1) that Jays reimburse its discharged tractor-trailer drivers for any loss of pay and benefits resulting from said discharges, and (2) in the event that

Jays resumed its cartage operations contracted out to Nielsen, that it offer to reinstate said tractor-trailer drivers to their former jobs.

The Board, by its Order of February 24, 1977, adopted the rulings, findings and conclusions of the Administrative Law Judge, except that the Board held that Jays should be required to resume and re-establish its former cartage operations.

The Court of Appeals held:

> "We find this a close and difficult case in which there is a great deal of conflicting evidence on many of the crucial questions. If we were deciding the case *de novo,* we might very well have made findings and conclusions contrary to some of the Board's determinations. However, we adhere to the limited scope of our review, and after reviewing the 1326-page record, we have concluded that the Board's findings regarding Jays' violations of the Act are supported by substantial evidence. Nevertheless, we find that the remedy provided by the Board is one case, 13CA-13889, is contrary to the recommended decision of the Administrative Law Judge and is not warranted by the record before us. Therefore, we hold the Board's order in this aspect to be an abuse of discretion and modify it to conform to the recommendations made by the Administrative Law Judge."

The statement of facts relating to this phase of the case, as set forth by the Court of Appeals in its opinion, also admittedly "adheres to the Board's findings, which adopted those made by the Administrative Law Judge". Unfortunately, the findings of the Administrative Law Judge distort the record, and present a slanted version of the evidence adduced in this cause, and of the inferences to be drawn therefrom, that is not in accord with the record.

What follows is a summary of the relevant evidence adduced in the trial of this cause relating to Jays terminating its cartage operations, and contracting same out to Nielsen, and an evaluation of the respective evidence adduced by the parties in the light of the applicable criteria or tests for determining whether or not the findings of fact of the Board are or are not supported by "substantial evidence on the record considered as a whole" as mandated by this Court in the *Universal Camera* case, *supra.*

Nielsen is a family owned trucking or cartage firm that has been engaged in the trucking business as a common carrier and contract carrier (pursuant to authority granted by the Interstate Commerce Commission). Jays is engaged in the business of manufacturing and selling of food snacks, primarily potato chips. It has not been engaged in the trucking or cartage business for hire, and has no authority from the Interstate Commerce Commission to do so. Prior to November 15, 1975, Jays handled its own cartage of its products (*i.e.,* the delivery of its own products in its own trucks from the factory to the branch distribution points) as an adjunct to carrying on its business of manufacturing and selling snack foods. (App. 189-193, 875-877, 1069; see also Respondent's Exhibit No. 10).

The record shows that for some years Nielsen had solicited Jays cartage business, attempting to convince Jays that due to Nielsen's expertise and experience as a professional trucking and cartage firm, it could perform the cartage work for Jays in a more economical and efficient manner than Jays could perform this work for itself (App. 887, 1071, 1122).

For the period covering May 21, 1975 and continuing through November 14, 1975, the parties, through their respective officers, engaged in negotiations which culminated

in the sale by Jays to Nielsen of all of Jays' tractors and trailers, and trucking supplies, and the entry into a transportation contract between Jays and Nielsen under which Nielsen undertook and agreed to handle on a contract basis all of Jays cartage hauling. These negotiations encompassed various meetings, telephone conversations, memorandums, inspections, etc. (App. 886-923, 941-966, 1071-1094, 1041-1060, 1159-1165).

The economic and business reasons that moved Jays to terminate its own private cartage operation, and to contract same out to Nielsen, are most succinctly set forth by Mr. Martilla in the supporting affidavit of Mr. Martilla (dated October 17, 1975), Respondent's Exhibit No. 10, filed with the Interstate Commerce Commission in support of Nielsen's application to the ICC for contract carrier authority to haul Jays' products. In that affidavit (see page 4 thereof), Mr. Martilla points out that Jays' private cartage operation "*has become so large, unwieldy and uneconomic that we just cannot continue conducting a private carrier operation.*" (Emphasis ours)

A memorandum (Respondent's Exhibit No. 11) prepared by Nielsen in late August or early September, 1975, and submitted to the Jays management at that time in connection with the then ongoing discussions and negotiations had between Jays and Nielsen, indicated that for the week of July 27th to August 2, 1975 (a week selected at random by Nielsen, after inspecting the driver's log books at Jays, as reflecting a typical weekly cartage operation at Jays) that Nielsen could have performed the cartage work of Jays for that week on a contract basis at a cost to Jays of $21,232.01. That compared to Jays actual cost of $23,203.32 (Respondent's Exhibit No. 12) for performing said cartage work itself for that week; a differential of $1,971.31 for that week which Jays could have saved had

Nielsen handled Jays' cartage work for that week at Nielsen's proposed contract rate, compared to Jays' cartage operational costs for that week. From this, Jays' management (Mr. Martilla) foresaw a potential savings of $100,000.00, or more, per year in its cartage operational costs if its cartage operation was "farmed out" or "contracted out" to Nielsen on a contract basis (App. 955). It was this potential savings that solidified the interest of Jays' management in Nielsen's proposition and proposal. (App. 892-905, 1044)

Thereafter, at Mr. Martilla's suggestion, as a further check on the potential of any such savings in cartage operational costs, Mr. Stanislawski, (the Treasurer of Jays) prepared an analysis of Jays' cartage operational costs for the first 35 weeks of 1975 (through 8/30/75, that being the only cost data to-date available at that time). Said analysis is reflected in Respondent's Exhibit No. 13, which indicated that the average weekly cartage operational costs of Jays for the first 35 weeks of 1975 wsa $22,552.00 per week; a differential of $1,320.00 per week compared to the $21,232.01 average weekly projected lower figure at which Nielsen indicated it could handle Jays' cartage work on a contract basis. From this Jays' management concluded that even if the projected savings were to amount to only $1,300.00 per week, that the annual savings in cartage operational costs, if the work was contracted out to Nielsen, could amount to anywhere around $65,000 to $75,000 per year. (App. 907-909).

An additional economic consideration which was highly persuasive to Jays' management in deciding to abandon its own cartage operation, and to contract the same out to Nielsen, was the fact that under such contract arrangement with Nielsen, Nielsen would purchase the tractor and trailers, and automotive supplies theretofore used by Jays

as part of its own cartage operation, thus enabling Jays to recoup, and make available for cash flow purposes its substantial capital investment in automobile equipment and supplies (App. 897, 905, 919, 1047).

In addition, it was felt that such an arrangement would eliminate the need for further sub.antial capital investments by Jays in replacement trucking equipment (particularly diesel tractors) that would be needed from time to time to replace obsolescent and worn out trucking equipment (App. 897, 1047, 955).

Further, from a personnel point of view, Mr. Marttila believed that by making the change over, that Jays' shipping supervisor, and those working in that department, would be able to do a better job in just concentrating on getting the trailer loaded, and that he (Marttila) would be personally relieved of spending time on running the cartage operation, and could more effectively concentrate on his prime responsibility of marketing and selling Jays' products (App. 956).

The record is undisputed that since November 14, 1975, when Jays terminated the employment of all its tractor-trailer drivers, and contracted out its cartage work to Nielsen, that no replacement tractor-trailer drivers have been employed or hired by Jays. It is also undisputed that since that time Jays had not purchased or otherwise acquired any replacement tractors or trailers to replace the automotive equipment that it sold to Nielsen; that Jays has not engaged on its own in the cartage of its own products from the factory to its branch distribution points; and that Nielsen has continued to handle Jays' cartage needs on a contractual basis. (App. 969)

The record shows that since November 17, 1975, Jays cartage requirements (*i.e.*, the delivery of its products

from the factory to the various branch distribution points) have been handled by Nielsen pursuant to contractual cartage agreement between Jays and Nielsen, and that as part of said transaction the tractor and trailer equipment theretofore used by Jays for its cartage operation was sold, and title to said equipment transferred to Nielsen. Nielsen paid Jays (i) the sum of $62,632.00 for the tractors purchased by it from Jays (Respondent's Exhibit No. 21), and (ii) the sum of $22,569.06 for automotive parts purchased by it from Jays (Respondent's Exhibit No. 22). In addition, Nielsen purchased Jays' 35 trailer units for the sum of $76,448.00 payable in monthly installments of $1,830.66 over a four year period, with the first installment due and payable on December 17, 1975. Nielsen's obligation therefore is evidenced by a Bill of Sale and an Installment Note dated November 17, 1975 (Respondent's Exhibt No. 23). The record shows that as of the date of the hearing in this cause that these monthly installments had been and were being currently paid by Nielsen to Jays. See also Respondent's Exhibit No. 26). The total capital investment thereby recouped and to be recouped by Jays under this arrangement amounted to $161,639.06 (Respondent's Exhibit No. 19. See also App. 981-987, 1055-1056).

Further the record shows that Nielsen purchased from General Motors Corporation, on or about January 17, 1976, three (3) diesel tractors for use in handling the cartage business, and paid therefore the sum of $55,950.00 (Respondent's Exhibit No. 27; App. 1111). This is a capital expenditure that Jays would have had, had it continued to handle its own cartage operation. In addition Nielsen purchased from Willett Leasing Company two (2) tractors that Jays had previously been leasing from Willett Leasing Company (App. 1108-1110).

The record further shows that Jays management's anticipated savings in cartage operating expenses as a result of farming out or contracting out its cartage operations to Nielsen have in fact been and apparently are in the process of being substantially achieved. Thus a comparative study made by Mr. Stanislawski (the Treasurer of Jays) of Jays' actual cartage operating expenses with Nielsen for the first 13 weeks of the first quarter of 1976 (those being the latest figures then available), compared to what it would have cost Jays to operate its own cartage needs for the same period of time, indicates a potential savings in cartage operating costs to Jays ranging from $1,526.00 per week ($23,320 minus $21,794) to $1,083 per week ($22,877 minus $21,794), depending on whether the hourly wage rate of the tractor-trailer drivers would have been $6.83 per hour (as contemplated by the unexecuted collective bargaining agreement with the Chicago Truck Drivers Union), or the then prevailing wage scale of that union of $7.28 per hour. (See Respondent's Exhibit No. 20; App. 978-981, 1056-1060). This is apart from the fact that Nielsen's cartage charges to Jays include a substantial increase in cartage operation volume handled by Nielsen that would have required further expenditures and costs by Jays to handle this increase in cartage volume (App. 994-999).

It is clear from the record that Jays' on-going negotiations with Nielsen, commencing on May 21, 1975 (App. 886-889, 1071-1072), *antedated in its inception and progression any overt union activities by any of the tractor-trailer drivers. There is no indication of any overt union activities by any of said drivers until mid-September, 1975,* when McCormick, one of the drivers, advised Lull, another one of the drivers, that he (McCormick) had contacted Teamsters Local No. 705 and had set up a meeting at the union hall for September 26th; a meeting which was attended by six of the drivers, and at which it was agreed to call a general meeting of the drivers with the Union on Saturday morning, October 4th at a motel in Calumet City. (App. 295-303, 258-261).

The record shows that the union officials from Teamsters Local No. 705 were well aware of the problems that the Chicago Truck Drivers Union had previously had with the Jays' tractor-trailer drivers, in having a contract negotiated by the union repudiated by the Jays' drivers (App. 309, 470), and that none of the officials from Teamsters Local No. 705 showed up at that meeting (App. 316-318, 473). Thereafter there were no overt union activities or meetings involving the tractor-trailer drivers (except for a conversation had between Siebert and Lull, two of the drivers, and Fred Boudreau and Pete Andronus of the Chicago Truck Drivers' Union in the middle of October, 1975, when Lull asked these union officials to "nosy" around a little to find out whether Jays was going to dispose of its cartage operations) (App. 320-324.)

The record is clear that before any overt union activities outlined above occurred, that negotiations between Jays and Nielsen had progressed to a point where (i) *Nielsen, on or about Sept. 2nd or 3rd had personally checked out Jays' cartage operations, and had inspected the log books of the Jays' drivers.* (App. 890-891, 1073-1074); (ii) *that Nielsen, on or about Sept 8th or 9th had submitted to worksheet calculation* (Respondent's Exhibit No. 11) *to Jays reflecting what it would have cost Jays to have had Nielsen handle Jays' cartage operations for a sample week* (App. 1074-1075, 891-893), *and had met with Mr. Stanislawski, of Jays, and had worked out a formula to purchase Jays' automotive equipment if the cartage operations were contracted out to Nielsen* (App.

903-905, 1041-1044, 1075-1077). *By Oct. 9th, the proposed agreement between Jays and Nielsen was firmly crystallized and agreed to, subject to contract formalization and ICC issuance of a certificate of contract authority to Nielsen to haul Jays' products* (App. 956-963, 1084-1089).

The pamphlet entitled "Let's Talk Dollars & Sense" (Gen. Counsel's Exhibit No. 16) put out by the Respondent Jays in connection with a totally different group of employees (the driver-salesmen), in connection with an N.L.R.B. election held on October 2, 1975, and not directed to the tractor-trailer drivers at all, is of no real probative value, and cannot properly give rise to any valid presumption of an anti-union animus upon the part of Jays as it relates to the reasons that Jays contracted out its cartage operations to Nielsen. *Given the admitted fact that the Respondent Jays had in good faith, after losing an N.L.R.B. election in October, 1973 involving these same tractor-trailer drivers, negotiated out a collective bargaining agreement with the Chicago Truck Drivers Union* (independent), which the men had rejected against the recommendation of their own certified collective bargaining agent (and which caused the union to voluntarily withdraw as collective bargaining agent), *there is no real basis for any inference that Respondent Jays was motivated by any anti-union animus, or by any alleged union activities of its tractor-trailer drivers* (of which there were really nothing of substance) *when it decided to contract out its cartage operations to Nielsen.* (See Respondents' Exhibit No. 15. Also see App. 926-933.)

The fact that Jays' name has continued to be shown on the trailers for advertising purposes (Nielsen's name is on the tractors) is totally irrelevant and of no probative value, and no inference of any unlawful motivation upon the part of the respondent in contracting out its cartage

operations to Nielsen can properly be drawn from said fact, as the Administrative Law Judge seems to imply. The fact is that Nielsen does the same for its other "contract" customers, including Zenith, Precision Scientific, Urban Products, etc. (App. 1135).

The fact that the tractors and trailers purchased by Nielsen from Jays continued, after said purchase, to be parked or stored on the Jays parking lot area contiguous to the Jays plant at 825 E. 99th Street, Chicago, Illinois, also is totally irrelevant and of no probative value on the issue of "successor employer"; and no inference of any unlawful motivation upon the part of the respondent in contracting out its cartage operations to Nielsen can properly be drawn from said fact, as the Administrative Law Judge seems to imply. As Mr. Nielsen pointed out, the fact is that "trailers, tractors and trucks with all our contract accounts, except for three vehicles, are housed, garaged, whatever term you want to use, at the customer's plant." (App. 1103)

The fact that former drivers for Jays, after being hired by Nielsen continued to haul Jays products in the trucks purchased by Nielsen is likewise totally irrelevant and of no probative value; and no inference of any unlawful motivation upon the part of the respondent in contracting out its cartage operations to Nielsen can properly be drawn from said fact as the Administrative Law Judge seems to imply. It would be logical for these men to be so used by Nielsen inasmuch as they were experienced in the handling of Jays' products. In addition, the terms of employment of these men at Nielsen were materially different from those that the men had had at Jays. For one thing, Nielsen's trucking operation was, and had for many years been unionized (the Chicago Truck Drivers, Helpers and Warehouse Workers Union, independent, be-

ing the collective bargaining agent of the drivers), and as a consequence those former tractor-trailer drivers of Jays who were employed by Nielsen had to join that union (See App. 173, 194-195). Secondly, the union hourly wage rate which they received on going to work for Nielsen was substantially higher than that which they had been receiving at Jays ($7.28 per hour compared to an hourly rate of $6.51 per hour at Jays). Thirdly, the union fringe benefit package which the drivers received at Nielsen was different from that which the drivers had while employed at Jays (App. 349-353) Fourthly, Nielsen installed tachographs in the tractors that it acquired from Jays to monitor the travel time and stoppage time of the drivers; something which had not been done at Jays (App. 500-501). Fifthly, when Nielsen took over the cartage operation at Jays on November 17, 1975, it put in its own dispatcher and automobile mechanic at Jays' plant to service said cartage operation (App. 1144-1147).

Nor can any inference of unlawful motivation upon the part of the respondent, Jays, be drawn, as does the Administrative Law Judge (App. 55), from the fact that the cartage contract (Respondents' Exhibit No. 18A and 18B) between Jays and Nielsen, though on a year to year basis, permits either party to cancel the same upon 30 days written notice, and permits Jays to repurchase certain equipment at certain annual periods until November 17, 1980 upon certain terms and conditions. Such a provision would be a logical concomitant to this first cartage agreement between the parties in the event that either of the parties, through experience, found that this arrangement wasn't working out in a satisfactory manner. (App. 960-961, 1053-1054, 1087).

Repeatedly, as noted above, the findings of the Administrative Judge repeatedly distort the record by reading

into it, by unwarranted inference after unwarranted inference, particularly where the evidence adduced by the Respondents is uncontroverted, his own colored interpretation of that evidence and his own value judgment of what management should or should not have done in deciding to contract out the Jays cartage operation.

A further prime example of that is the finding of the Administration Law Judge that while he had no doubt that some dollar savings would be ecected by Jays in contracting out its cartage operations to Nielsen, that he did not believe that Jays would have contracted out its cartage operation and departed from its past practice of handling and directly controlling its own cartage operations "but for the advent of the drivers' effort to bring the Teamsters into the operation." (App. 57)

Another is his finding "that the possibility of the Teamsters coming in was a substantial factor in the decision to subcontract the operation", and that "the discussions between Nielsen and Jays with respect to the former taking over Jays' delivery operations did not become serious until the late part of September, when the employees began contacting the Teamsters, leading to a tentative decision on October 1, and a firm decision on October 9 to contract out the operation" (App. 56).

Another is the finding "that although Jays claims negotiations were initiated in May with Nielsen concerning contracting out this operation, and though Jays assertedly found it necessary to cut back on expenses between May and July because of adverse market conditions, no effort was made during that period to act on Nielsen's contention that he could perform the deliveries more economically than Jays", and that "after the drivers began their union activity, the negotiations became accelerated and the decision made." (App. 57)

Equally blatant and unfair is the unwarranted finding and inference of the Administrative Law Judge:

> "From my observation of the witnesses and consideration of the facts, I am persuaded that such contracts and discussion as may have occurred before September 17 (relating to the negotiations between Jays and Nielsen) were more casual and less definite than the witnesses indicated in their testimony, and that some later events may have been transposed to a slightly earlier time." (App. 49).

These are all unwarranted inferences and subjective judgments upon the part of the Administrative Law Judge, totally unsupported by any substantial, clear and convincing evidence, and contrary to the clear import of the evidence adduced in the record.

The economic and business reasons that moved Jays to terminate its own private cartage operations, to sell its cartage equipment, and to contract its cartage operation out to Nielsen are clear and uncontroverted, and have been previously detailed. That there were legitimate, bona fide and sound business and economic reasons for Jays contracting out its cartage operations is abundantly clear from the record. This was too important a step for Jays to act precipitously on this matter, and the record makes clear that Jays' management very carefully analyzed Nielsen's proposal, and the cost and distribution implications thereof, before deciding to contract its cartage operations out to Nielsen.

That the findings of the Administrative Law Judge, and the inferences aforesaid drawn by him therefrom, are not supported by "substantial evidence on the record considered as a whole" should be evident from the uncontroverted facts recited afoersaid; from the fact that Jays, after losing an NLRB election in October, 1973 involving

these same tractor-trailer drivers, had negotiated out a collective bargaining agreement (Respondents' Exhibit No. 15, App. 1263) with the Chicago Truck Drivers Union (Independent), the then certified collective bargaining agent of said tractor-trailer drivers (thus reflecting respondent Jays' willingness to deal and negotiate with a union), which the drivers repudiated; from the fact that Jays' on-going negotiations with Nielsen, commencing on May 21, 1975, antedated in its inception and progression, as detailed aforesaid, any overt union activities by any of the tractor-trailer drivers; and from the further fact that the alleged union activities of some of the drivers in going to Teamsters Local No. 705, was at best short lived and sporadic (at most from mid-September, 1975 to October 4, 1975, with their being no overt union activities and meetings of the tractor-trailer drivers after October 4, 1975, when the Teamster representatives failed to show up at the motel for a meeting with the drivers), which would seem to indicate that the sudden union activity upon the part of some of the tractor-trailer drivers was the *result of rather than the cause of* Jays' negotiations with Nielsen, since Mr. Nielsen had personally checked out Jays' cartage operation on September 2nd or 3rd of 1975 at the Jays plant and had inspected the log books of the Jays' drivers. Why else would Lull, in the middle of October, 1975 be asking two union officials from the Chicago Truck Drivers Union to "nosey" around a little to find out whether Jays was going to dispose of its cartage operations?

Given the record noted above, what then is the so-called evidence upon which the Administrative Law Judge predicates or grounds his finding and conclusion that Jays contracted out its cartage operations to Nielsen and discharged its truck drivers because of their union activities,

and does that evidence meet the test of substantiality on the record considered as a whole mandated by the *Universal Camera* case?

This so-called evidence ("minutiae" would be a more apt term), discussed below, consists of several scattered and unrelated inquiries and or statements, devoid of any real threats or promises and some of which are disputed and controverted, made by or attributed to supervisory personnel of Jays, whose cumulative impact can in no sense be regarded as substantial evidence on the record considered as a whole on the issue as to Jays' "motivation" in contracting out its cartage operations to Nielsen. See *N.L.R.B.* v. *United Parcel Service Inc.,* 317 F.2d 912, 914 (C.A. 1st, 1963).

One part of the "minutiae" is the fact that Staton, the assistant shipping supervisor at Jays, in late September or early October, 1975, when he came back from his vacation, asked three or four of the tractor-trailer drivers whether they had contacted a union, and whether they wanted a union, and was told by those of whom he made such inquiry that they didn't know anything about a union. (App. 202-203, 219-224).

The record clearly indicates that Staton's inquiry was innocuous, completely devoid of threats or promises, completely free of coercive statements, and completely free of resort to systematic intimidation; and therefore within the free speech protection of the Act.

In *N.L.R.B.* v. *Century Broadcasting Corporation,* 419 F. 2d 771, 780 (C.A. 8th, 1970), the Court held that where employer's general manager had been informed that some employees had signed union authorization cards, manager's inquiry of employee whether he knew men were

going union did not constitute prohibited interrogation. Said the Court:

> "Isolated interrogation, free of coercive statements and absent resort to systematic intimidation, does not constitute an unfair labor practice but falls within the free speech protection of the Act. *Beaver Valley Canning Co.* v. *N.L.R.B.,* supra (332 F. 2d at 433)."

In *N.L.R.B.* v. *Twin Table & Furniture Co.,* 308 F. 2d 686 (C.A. 8, 1962), it was held that interrogation of employees about the union by representatives of the respondent's management was not a violation of the Act because the interrogation was innocuous and devoid of threats or promises.

To like effect see *Beaver Valley Canning Company* v. *N.L.R.B.,* 332 F. 2d 429, 433 (C.A. 8, 1964); *H. Kress & Co.* v. *N.L.R.B.,* 317 F. 2d 225 (C.A. 9, 1963); *N.L.R.B.* v. *Larry Faul Oldsmobile Co.,* 316 F. 2d 595 (C.A. 7, 1963); *Lincoln Bearing Co.* v. *N.L.R.B.,* 311 F. 2d 48 (C.A. 6, 1962); *Acme Products, Inc.* v. *N.L.R.B.,* 389 F. 2d 104, 107-108 (C.A. 8, 1968); *N.L.R.B.* v. *Arkansas Grain Corporation,* 392 F.2d 161, 165-166 (C.A. 8, 1968); *N.L.R.B.* v. *Prince Macaroni Manufacturing Co.,* 329 F.2d 803, 806 (C.A. 1st, 1964); *N.L.R.B.* v. *Monroe Auto Equipment Co.,* 368 F.2d 975, 979-981 (C.A. 8, 1966).

Staton, it is to be noted, testified that he made such inquiry on his own, and that nobody in management suggested or authorized him to make such inquiry.

The same is true of the opinion expressed by Staton on or about November 5, 1975 (approximately a month after Jays' management and Nielsen had arrived at an agreement for Nielsen to handle Jays' cartage operations, and approximately 10 days before Jays terminted its cartage operations), in a conversation with a Siebert

Kuiken, one of the tractor-trailer drivers that the "Old Man" (Mr. Japp, Sr.) was going to get rid of the trucking operation. (App. 203).

The Administrative Law Judge also saw fit to predicate his finding and judgment on the uncorroborated testimony of Robert Lull, one of the tractor-trailer drivers and the complainant in Cases No. 13-CA-14889 and 13-CA-14890), of an alleged conversation had by him with Staton in the washroom of a tavern, after the meeting of the trailer-tractor drivers at the plant at 5:00 P.M., on October 3, 1975. Supposedly, Mr. Staton had gone to the tavern with eight of the drivers, including Lull. Lull's testimony was as follows (App. 271):

> "John told me, he says, Bob, you know the old man is talking about selling the fleet. I said, John, I have heard this ever since I have been working here. I said I will believe it when I see it. John says, well, this time the old man is serious and that was the end of the conversation."

On a similar vein is the uncorroborated and controverted testimony of James Paluch, a tractor-trailer driver of Jays (who was not employed by Nielsen until January 12, 1976) of an alleged conversation had by him with Art Timmons, Sr., (a son-in-law of Mr. Japp, Sr.), at the North branch around the middle of October, 1975. Paluch's testimony as to the alleged conversation was as follows (App. 430):

> "And he (Timmons) says, I understand you guys are starting this union stuff again. I said, I don't want to know anything about it. I don't know anything about it. I don't want to know anything about it. . . . And he (Timmons) says, well, tell you one thing he says, you are getting the old man (Mr. Japp, Sr.) pretty mad and he's going to sell the trucks."

Timmons denied having any such conversation with Paluch. (App. 564)

Of similar questionable evidentiary quality is the finding of the Administrative Law Judge that Jays, through Leonard Japp, Sr., its president, did on or about October 3, 1975, threaten "to close the doors" of the respondent if the employees brought the Teamsters in, and illegally interrogated Ronald Davis, one of its tractor-trailer drivers of Jays not hired by Nielsen until January 12, 1975).

There is no "substantial" evidence to support this finding. There is only the uncorroborated and less than credible testimony of Davis who testified to an alleged conversation (denied by Mr. Japp, Sr.) that he had with Mr. Japp at approximately 6:15 P.M. on October 3, 1975 in the dispatcher's office at the Jays plant, at which another tractor-trailer driver, one Charles Dietz, was according to Davis, allegedly present.

On cross-examination Mr. Davis, who was a union member when hired by Jays (App. 449-451), testified that Mr. Japp, Sr. did not indicate where the meeting was going to be at, or with whom the meeting was going to be, or that the meeting was a union meeting. (App. 453-454). Mr. Davis also testified that Mr. Japp, Sr., did not, thereafter, ever ask him about the meeting, did not ask him (Davis) whether he had gone to the meeting, or say anything to him about unions, or about closing the trucking operations. (App. 460).

It is to be noted that Charles Dietz, the other tractor-trailer driver of the respondent who, according to Davis, was allegedly present at this conversation, was not called as a witness by the General Counsel. So Davis' testimony is uncorroborated.

Mr. Japp, Sr. testified that he left the office for home between *3:00 & 3:30* P.M. in the afternoon of October 3, 1975, that he was not at the meeting held with the tractor-trailer drivers at the plant later that afternoon (about 5:00 P.M.), and that he did not have any conversation either with Davis or Dietz, as claimed by Davis. (App. 1152-1154) It is to be noted that two other tractor-trailer drivers of the respondent (Jays), Robert Lull, (App. 326, 330-331) and James Paluch, (App. 443-444) do not recall seeing Mr. Japp, Sr. either at the meeting or thereafter on that date. The testimony of Messrs. Marttila and Whalen of the respondent company (Jays) was to like effect. (App. 937-938, 1179)

The credibility of Davis' testimony is also impeached by his claim that his alleged conversation with Mr. Japp, Sr. took place about 6:15 P.M. on October 3, 1975, "shortly after the meeting". The testimony of Lull, and others, was that the meeting with the tractor-trailer drivers held that afternoon at 5:00 P.M. was of short duration, and was over no later than 5:30 P.M. (App. 446-447, 1067-1068)

The Administrative Law Judge also found that Jays (through Mr. Marttila, Executive Vice President of Marketing), did on or about October 3, 1975 on the one hand grant a 32 cents per hour wage increase to its tractor-trailer drivers in violation of Section 8(a)(1) of the Act, and did, on the other hand at the same time, in violation of the Act, threaten to withhold said 32 cents per hour wage increase from those tractor-trailer drivers who engaged in union activities.

There is no substantial evidence in the record to sustain either of these unwarranted conclusions and findings.

First as to, the 32 cent per hour wage increase which Mr. Marttila announced at the meeting with the truck drivers held on October 3, 1975, this was not something new or unexpected that the respondent suddenly came up with like a bolt from the blue. It was part of a semi-annual series of wage increases that the Respondent, Jays, had previously negotiated out, after extensive negotiation and bargaining, with the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) in January, 1974 (as reflected on page 3 of the unexecuted Collective Bargaining Agreement identified as Respondent's Exhibit No. 15), when the Union was the collective bargaining agent of the truck drivers (having won an NLRB election and having been certified on November 7, 1973 in Case No. 13-RC-13144); and which Mr. Marttila, on behalf of the Respondent, had voluntarily committed the Company to live up to after the Union on February 13, 1974 had walked away from representing the truck drivers when the truck drivers rejected the proposed union contract. (App. 930-933) This was the raise that the unexecuted Collective Bargaining Agreement had contemplated that the respondent, Jays, would give on July 1, 1975 and which the truck drivers had, at Mr. Marttila's request back in June or July, 1975, unanimously agreed to defer because of tight economic conditions upon the part of the respondent at that time. (App. 292-294, 934-937)

Secondly, there is nothing in the record to indicate that the granting of the 32 cent per hour wage increase on or about October 3, 1975 was in any way related to any union activity or was in any way given to induce the truck drivers to refrain from engaging in union activities. (App. 211-212, 440-441, 507-508, 940, 1178-1180)

The Administrative Law Judge's finding that Marttila had threatened to withhold the 32¢ per hour wage increase is predicated on Lull's controverted and disputed testimony that Marttila, in announcing the raise, had allegedly said: "I hear a few of you fellows have contacted a union. . . . . If I knew who the union people were who had participated in this . . . I would hold back the 32 cents, but since I don't know, the only thing I can do is give it to everybody"; and had further allegedly said (allegedly referring to the prior unexecuted union contract with the Chicago Truck Drivers' Union): "I don't know what the hell you fellows want, but if you want a union, why don't you go back to Fenner's Union because he got you this . . . . You fellows aren't loyal to anyone but yourselves (App. 269).

Mr. Marttila's testimony was that in his talk to the men that he made no reference to any union activity by the men, and made no threat to hold back the 32¢ per hour wage increase from any of the men because of this. He did say (because of reports that he had received from Bob Neal, the shipping supervisor that some of the drivers were "dogging it",—that is, taking more time with the deliveries and unloading than was required) that not all the men deserved the raise, and that in giving the raise the Company was living up to its voluntary commitment, made to the men after Fenner's union walked away, to live up to the wage increases that had been negotiated with Fenner's union. (App. 939-940). Mr. Marttila's version of what was said at that meeting is supported and corroborated not only by other management personnel (App. 211-212, 1178-1180), but by the testimony of James Paluch, one of the tractor-trailer drivers called as a witness by the General Counsel of the Board), who testified that there were no strings attached to Marttila's wage

increase announcement, and that Marttila never threatened to take back the proposed increase because of the men going to the union (App. 441-442).

The Administrative Law Judge chose to credit Lull's version of what was said by Marttila, despite the countervailing evidence noted above. Even if Lull's testimony is credited, it is respectfully submitted that the same does not constitute "substantial evidence on the record as a whole" as to Jays' motivation in contracting out its cartage operations to Nielsen. Nor would Marttila's statement, even under Lull's version, constitute such actionable threat or coercive statement as would constitute an unfair labor practice in violation of the Act; since the alleged threat was at best a toothless one, since Marttila, from Lull's own testimony, admittedly did not know or indicate that he knew who of the tractor-trailer drivers were engaged in union activity, and that admittedly all the men got the raise without exception (App. 269).

The relevance and weight given by the Administrative Law Judge to the "minutiae" noted aforesaid is far disproportionate to the weight that can and should be given the same under the substantiality test of *Universal Camea,* supra, and is far outweighted by: (1) the substantial and uncontroverted evidence in the record that Jays had valid and bona fide business and economic reasons for getting rid of its cartage operations and contracting the same out to a professional cartage trucking firm, and stood to effectuate substantial cost savings by doing so; (2) the fact that Jays' on-going negotiations with Nielsen, detailed aforesaid, commencing on May 21, 1975 *antedated in its inception and progression* any overt union activities by any of the tractor-trailer drivers; (3) the fact that Jays had several years before negotiated a

collective bargaining agreement with the Chicago Truck Drivers Union in connection with the same tractor-trailer drivers, when the men in a NLRB election had voted to have said union as their collective bargaining agent, thus demonstrating Jays' willingness to negotiate and live with a union where its employees had voted for a union; and (4) by the fact that the alleged union activities of some of the drivers in going to Teamsters Local No. 705, was at best short-lived and sporadic (at most over a period of a little more than two weeks, from mid-September, 1975 to October 4, 1975), *and did not commence until subsequent* to Mr. Nielsen's inspection of Jays cartage operations and the driver log books at the Jays' plant on September 2nd or 3rd, 1975, a fact that quickly became known to the tractor-trailer drivers and gave rise to the rumors that Jays was considering or was going to farm out its cartage operations,—from which it could reasonably be inferred that the sudden union activity upon the part of some of its driver-salesmen *was the result of, and not the cause of,* Jays' negotiations with Nielsen; an inference that the Administrative Law Judge, to whom every move or decision of management was suspect, never even considered.

What the Administrative Law Judge has done is to repeatedly distort the record, under the guise of unwarranted credibility findings, by reading into it, by unwarranted inference after unwarranted inference, particularly where the evidence adduced by the respondent is uncontroverted, his own colored interpretation of that evidence and his own value judgment of what management should or should not have done in deciding to contract out the Jays cartage operation.

When all is said and done, it is this time sequence of events, and not the disputed minutiae and bits and pieces

credited by the Administrative Law Judge which purport to support a decision unfavorable to the employer, which should be the yardstick by which Petitioner's real motive for contracting out its cartage operations should be fairly measured.

In *National Labor Relations Board* v. *Houston Chronicle Pub. Co.,* 211 F. 2d 848, 851, 854-55 (C.C.A. 5th—1954), denying enforcement of the Board's order in 101 N.L.R.B. 1208 (1953), where respondent had abolished its newspaper circulation department and had instituted an independent contractor system of distribution, the Circuit Court of Appeals said:

> "The issue is not whether the business reasons advanced by the respondent were good or bad, but whether the respondent actually in good faith had business motives for the change, or whether the change was illegally motivated.
>
> • • •
>
> ". . . the Board observed that respondent's illegal motivation was also inferrable from the precipitate manner in which respondent effected the change-over to the independent contractor system. We do not think that, because the respondent accelerated the change-over in order to avoid anticipated union interference, it necessarily follows that the original decision to change was to defeat union organization efforts. It is the motive for the decision to change-over that is material to this controversy rather than the motive for accelerating the change-over.
>
> "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible of being misunderstood and hard to prove or to disprove. If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enter-

prise, the only system under which either labor or management would have any rights, is on the way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is evidence possessed of genuine substance. In our opinion, this is not such a case."

In *Valley Forge Flag Company* v. *N.L.R.B.*, 364 F.2d 310, 311 (C.A. 3rd, 1966), the Third Circuit noted:

> Several circuits have held that a predominant economic motive to subcontract or to close the plant and transfer operations, even though accelerated by union organizing efforts, does not constitute a violation of the Act. *NLRB* v. *New England Web, Inc.*, 309 F.2d 696 (C.A. 1, 1962); *NLRB* v. *Rapid Bindery, Inc.*, 293 F.2d 170, 173-175 (C.A. 2, 1961); *Jays Foods, Inc.* v. *NLRB*, 292 F.2d 317 (C.A. 7, 1961); *NLRB* v. *Lassing*, 284 F.2d 781 (C.A. 6, 1960), cert. denied, 366 U.S. 909, 81 S.Ct. 1085, 6 L.Ed.2d 235 (1961); *NLRB* v. *Houston Chronicle Pub. Co.*, 211 F.2d 848 (C.A. 5, 1954). Compare *NLRB* v. *Preston Feed Corp.*, 309 F.2d 346, 350-352 (C.A. 4, 1962); *NLRB* v. *Brown-Dunkin Co.*, 287 F.2d 17 (C.A. 10, 1961). See also annot., 5 A.L.R.3d 733 (1966)."

In the following additional cases, among others, it was held that the contracting out of work did not constitute an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act as amended, on the ground that the employer's motive for the subcontracting was based on economic considerations:

N.L.R.B. v. *R.C. Mahon Co.*, 269 F.2d 44 (C.A. 6, 1959).

N.L.R.B. v. *Drennon Food Products Co.*, 272 F.2d 23 (C.A. 5, 1959).

N.L.R.B. v. *J. Mitchko, Inc.*, 284 F. 2d 573 (C.A. 3, 1960).

N.L.R.B. v. *W. L. Rives Co.*, 288 F. 2d 511 (C.A. 5, 1961).

Jays Foods, Inc. v. *N.L.R.B.*, 292 F. 2d 317 (C.A. 7, 1961).

N.L.R.B. v. *Adkins Transfer Co.*, 226 F.2d 324, 326 (C.A. 6, 1955).

N.L.R.B. v. *Kingsford*, 313 F. 2d 826 (C.A. 6th, 1963).

N.L.R.B. v. *Lassing*, 284 F.2d 781 (C.A. 6, 1960), cert. denied 366 U.S. 909, 81 S.Ct. 1085, 6 L.Ed. 2d 235.

As is pointed out in *N.L.R.B.* v. *Garner Tool and Die Manufacturing, Inc.*, 493 F. 2d 263, 267-268 (C.A. 8, 1974):

> "Thus the Board's findings may not rest on 'suspicion, surmise, implications, or plainly incredible evidence.' *Amyx Industries, Inc.* v. *N.L.R.B.*, 457 F. 2d 904, 907 (8th Cir. 1972); see also Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 484, 71 S. Ct. 456, 95 L. Ed. 456 (1951). And, as we have previously stated 'circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding.' *N.L.R.B.* v. *Ace Comb Co.*, 342 F. 2d 841, 848 (8th Cir. 1965).

It is respectfully submitted (to paraphrase *Labor Board* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 660 69 S.Ct. 1283, 93 L.Ed. 1602 (1949), that much of the testimony credited by the Administrative Law Judge "carries its own death wound", and much of Petitioner's unrebutted testimony rejected by the Administrative Law Judge "carries its own irrefutable truth." For the Court of Appeals, therefore, to give the uncritical deference that it does to the

unwarranted findings, inferences and conclusions of the Administrative Law Judge, is not only grossly unfair to the Petitioner, but is inconsistent with the mandate expressed in the *Universal Camera Corp.* case, that the Court of Appeals in reviewing Labor Board cases should not abdicate their reviewing function. For if the Court of Appeals believes, as it does, that the Olson case is so close "that it teeters on the balance", and if it were deciding the case de novo "we might very well have made findings and conclusions contrary to some of the Board's determinations", then clearly the evidence adduced on behalf of the Petitioner must carry with it enough of its own "irrefutable truth", and the testimony credited by the Administrative Law Judge carries enough of its own "death wounds", to warrant the Court concluding that the findings, inferences and conclusions of the Administrative Law Judge are not supported by "substantial evidence on the record considered as a whole."

IV. The Propriety Of The Remedy:

Section 10(c) of the National Labor Relations Act, as amended by The Labor Management Act of 1947 (29 U.S.C.A. Sec. 160(c)), provides, among other things as follows:

> *"No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . ."* (Emphasis ours)

As previously pointed out, the Court of Appeals in the instant cause was moved to say (Emphasis ours):

> "We recognize, as did the Board, that *Olson was negligent in the discharge of his duties"*; and
>
> • • •

> *"There may have been other, justifiable reasons for its discharge"*, other than his union activity;

In light of the statutory mandate aforesaid, and the Court of Appeals recognition that there were justifiable reasons for Olson's discharge ,other than his union activity, it is respectfully submitted that the Board and the Court of Appeals erred in ordering Jays to offer Olson reinstatement to his former job, with back pay. See sub-paragraph 2(a) of the Judgment Order, entered by the Court of Appeals on May 23, 1978 (Appendix "D").

Sub-paragraph 2(b) of said Judgment Order of the Court of Appeals provides as follows:

> "(b) In the event Respondent Jays Foods, Inc. resumes its delivery operations which were contracted to Nielsen Brothers Cartage, Inc., on or about November 17, 1975, *or withdraws such delivery operations from Nielsen Cartage,* offer the employees named below" (some 26 employees) "immediate and full reinstatement to their former jobs, in accordance with the provisions of paragraph number II of the Section entitled 'The Remedy' above." (Emphasis ours)

Jays has objected to both sub-paragraphs 2 (a) and 2 (b) of the Judgment Order, and has suggested as it relates to sub-paragraph 2 (b) aforesaid Order that the underscored clause *"or withdraws such delivery operations from Nielsen Cartage"* should be deleted from the Order for the following reasons. Although Nielsen Cartage has and is continuing to handle Jays' cartage operations on a satisfactory basis, at a cost savings to Jays compared to what it would have cost Jays to handle its own cartage operation, it is possible in the future that Jays, for any number of valid business reasons (including any deterioration in the quality of service and any

unwarranted increases in the contract rates charged by Nielsen in the future), may deem it desirable to shift its cartage operations from Nielsen to other third party cartage companies. It should have the right to do so, without having an obligation to offer the named former tractor-trailer drivers reinstatement to jobs that don't exist (so long as Jays itself does not resume its cartage operations). The clause as it now reads would, if Jays were to shift its cartage operations to cartage firms other than Nielsen, create an unwarranted problem as to whether Jays by reason thereof would have to offer reinstatement to its former tractor-trailer drivers, even though Jays itself was not reassuming its own cartage operations. In addition, a reasonable time limit should be placed on the operation of sub-paragraph 2(b) so that it does not operate as an indefinite and unwarranted restraint on petitioner's operations in the future.

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF WRIT

From the foregoing, it should be apparent that the Court of Appeals in the instant cause has misapprehended the criteria or tests for determining what constitutes "substantial evidence on the record considered as a whole", thereby unduly fettering, restricting and limiting the permitted scope of its review and the exercise of its independent judicial judgment; and has misapplied the standard of review set forth in the *Universal Camera* case, *supra*.

For one thing, it is obvious that the Court of Appeals in the instant cause, in reviewing the findings of the Board to determine whether or not they are supported by "substantial evidence on the record considered as a whole", has not exacted of the Board, or of itself, that the Board's

findings meet the Congressional mandate, standard and test (recognized by the Board's own rules) of being supported by *at least a preponderance of the credible evidence*, or *the weight of the credible evidence*.

The purported evidence on which the Court of Appeals is prepared to let the Board infer (to use the language of the Court of Appeals) "that Olson's discharge was due *in part at least* to his union activity", and that Jays' decision to contract out to Nielsen "was motivated *at least in part* by antiunion considerations" (emphasis ours), is certainly not such as would constitute at least a preponderance of the credible evidence, or the weight of the credible evidence; and is certainly something less than a preponderance of the credible evidence.

The Court of Appeals in the instant case also misconceives the scope of its review as it relates to credibility determinations made by the Administrative Law Judge when it says in its opinion "it is the function of the Administrative Law Judge and the Board to make credibility determinations, not this Court." (Appendix "A", infra, p. 12a). As Justice Frankfurter pointed out in *N.L.R.B.* v. *Walton Manufacturing Co.*, 369 U.S. 404, 418-419, 82 S.Ct. 853, 7 L.Ed. 2d 829 (1961), heretofore cited in detail, "due regard for the trier of fact does not require appellate impotence," and administrative determinations of credibility can and should be set aside where the reviewing court believes that a fair estimate of the worth of the testimony of witnesses precludes the Board's credibility findings, or where the reviewing court believes that the evidence supporting that determination is less credible than the opposing evidence.

There are repeated examples of unwarranted credibility findings by the Administrative Law Judge in the

instant cause, particularly in the Olson case, as hereinbefore detailed whose supporting evidentiary base is far less credible than the opposing evidence. In deferring to and uncritically accepting these unwarranted findings at face value, the Court of Appeals has in effect emasculated its reviewing function contrary to the spirit and intent of the *Universal Camera* case, supra.

It is not clear from a reading of the opinion of the Court of Appeals in the instant cause, what criteria or tests the Court used in determining whether the findings of the Board are or are not supported by "substantial evidence on the record considered as a whole", as mandated by the *Universal Camera* case, *supra.* As previviously pointed out, the opinion merely refers to *N.L.R.B.* v. *Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300, 59 S.Ct. 501, 505, 83 L.Ed. 660 (1939), a case antedating the amendments made to the National Labor Relations Act by the Labor Management Relations Act of 1947, where the Supreme Court said:

> "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, *Consolidated Edison Co.* v. *National Labor Relations Board, supra,* p. 229, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. See *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521, 524; *Gunning* v. *Cooley,* 281 U. S. 90, 94; *Appalachian Electric Power Co.* v. *National Labor Relations Board, supra,* 989."

The Court of Appeals reference to the *N.L.R.B.* v. *Columbian Enameling & Stamping Co., supra,* would seem

to indicate that the Court of Appeals predicated its criteria or test for determining whether the findings of the Board are or are not supported by "substantial evidence on the record considered as a whole" on an evidentiary standard and standard of proof far less demanding than that mandated by the Congress in Section 10(c) of the National Labor Relations Act, as amended by The Labor Management Relations Act of 1947, and the *Universal Camera* case, *supra.* The Court of Appeal's opinion reflects that lesser evidentiary standard of proof, and is in error.

Nor does the Court of Appeals in the instant cause follow the criteria or test in *Torrington Company* v. *N.L.R.B., supra,* which holds, consistent with the standard and burden of proof imposed on the Board by Section 10(c) of the Act, that the substantial evidence test is not satisfied by evidence "which gives equal support to inconsistent inferences."

It should be also noted that the decision of the Court of Appeals in the instant cause is in conflict with decisions in other circuits as heretofore noted, which have held that "a *predominant economic motive* to subcontract . . . ., even though accelerated by union organizing efforts, does not constitute a violation of the Act." It is also in conflict with a previous decision of the Seventh Circuit in the case of *Jays Foods, Inc.* v. *N.L.R.B.,* 292 F.2d 317 (C.A. 7, 1961), involving the same petitioner herein, in an unrelated case where the termination of its automotive repair and maintenance department (which had existed for many years), and the farming out of its automotive repair and maintenance work to outside garages was held to be perfectly proper.

CONCLUSION

Wherefore, Petitioner respectfully prays that this Petition for a Writ of Certiorari be granted, and that upon hearing and review of this cause that the judgment order of May 23, 1978, of the Court of Appeals for the Seventh Circuit be reversed, set aside and held for nought, and this cause remanded to said Court of Appeals with appropriate directions.

Respectfully submitted,

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